

# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1959

No. 40

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PHILLIPS CHEMICAL COMPANY, APPELLANT,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

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FILED MARCH 13, 1959

PROBABLE JURISDICTION NOTED MAY 18, 1959

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PHILLIPS CHEMICAL COMPANY, APPELLANT,

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APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

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[fol. 1]

**IN THE DISTRICT COURT OF MOORE COUNTY,  
TEXAS, 69th JUDICIAL DISTRICT**

No. 6697

MOORE COUNTY, DISTRICT COURT No. 2708-A

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**PHILLIPS-CHEMICAL COMPANY, Appellant,**

**vs.**

**DUMAS INDEPENDENT SCHOOL DISTRICT, et al., Appellee.**

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Transcript from 69th Judicial District Court of  
Moore County at , Texas.

Hon. Harry H. itz, Judge Presiding.

E. H. Foster, T. M. Blume & C. Rex Boyd, Attorneys  
for Appellant, Box 1751, Amarillo, Texas, P. O. Address.  
James W. Witherspoon, Wayne E. Thomas, John D.  
Aikin & Earnest L. Langley, Attorneys for Appellee, Box  
473, Hereford, Texas, P. O. Address.

No. A-6639

Filed in Supreme Court  
of Texas

February 12, 1958

Geo. H. Templin, Clerk  
By Jewell Seeliger, Deputy

Filed in Court of Civil  
Appeals for Seventh  
Supreme Judicial Dis-  
trict of Texas

Jan. 31, 1957

Elmo Payne, Clerk

Applied for by T. M. Blume, Attorney for Appellant,  
on the 12th day of December, 1956, and delivered to T. M.  
Blume on the 8th day of January, 1957.

Hazel Haile, Clerk, District Court, Moore County,  
Texas.

[fol. 4]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

No. 2708

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PHILLIPS CHEMICAL COMPANY, Plaintiff.

v.

DUMAS INDEPENDENT SCHOOL DISTRICT, Defendant.

---

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION—  
Filed September 1, 1956

To the Honorable Court:

Comes now Phillips Chemical Company, a corporation, hereinafter referred to as Plaintiff, and files this its First Amended Original Petition, amendatory and in lieu of its Original Petition hereinbefore filed, and complaining of Dumas Independent School District, Defendant, hereinafter referred to as School District, and for cause of action against said Defendant says:

First Cause of Action

I.

That at all times material hereto, plaintiff has been and still is a corporation (sic) duly organized, created and existing under and by virtue of the laws of the State of Delaware, with a permit to do business and doing business in the State of Texas, and a wholly owned subsidiary of Phillips Petroleum Company, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Delaware, with a permit to do business and doing business in the State of Texas.

II.

That Dumas Independent School District is a body politic and a corporation organized, created and existing under

and by virtue of the laws of the State of Texas, with the power to sue and be sued.

[fol. 5]

### III.

Plaintiff says that pursuant to a written lease not for a term of three years or more, dated July 22, 1948, executed by and between the United States of America, hereinafter referred to as the Government, and Phillips Petroleum Company, its predecessor in interest, and on or about August 16, 1948, and as a lessee, it entered into possession of certain real and personal property consisting of the land, buildings, improvements, machinery and appurtenances thereunto belonging, and described in Exhibits "A" and "B" attached to the lease, owned by the Government, and located within the territorial limits of the School District, and generally known and referred to as the Cactus Ordnance Works, for the purpose of operating, using, occupying and conducting thereon, in its private capacity, an ammonia and nitric acid plant for the purpose of manufacturing anhydrous ammonia or fertilizer and for other commercial and experimental purposes; that since August 16, 1948, to the present time, plaintiff says it has been in possession of the property, operating, using, occupying and conducting thereon in its private capacity, an ammonia and nitric acid plant, and manufacturing anhydrous ammonia and nitric acid.

### IV.

Plaintiff says that notwithstanding the fact that it is holding property exempt by law from taxation in the hands of the owner thereof, under a lease not for a term of three years or more, the School District, on or about May 1, 1954, and without any lawful right or authority so to do, and with the purpose, intent and design of wilfully, unlawfully and illegally collecting from this plaintiff the sum of \$305,346.73 as ad valorem taxes for the years 1949 through 1954, inclusive, assessed for taxes as [fol. 6] property belonging to Phillips Petroleum Company, and for which it is claimed plaintiff is liable for taxes thereon, the following described property:



"All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

• • • • •

#### CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 78 of this record with the words 'That part of sections . . . ' and ending at page 86 of said record with the words ' . . . of the N.E. corner thereof.' "

• • • • •

[fol. 12]

#### V.

Plaintiff says that notwithstanding the fact that the Government is the owner of the property, and it is exempt from taxation, and notwithstanding the fact that the plaintiff is holding the property under a lease not for a term of three years or more, and notwithstanding the fact that the leasehold estate of the plaintiff has never, in fact, been assessed for taxes, all of which facts are well known to the School District, the School District has submitted to the plaintiff a tax statement totaling the amount of \$305,346.73, claiming that there is now due and owing from the plaintiff to the School District this sum for ad valorem taxes on the property above described for the years 1949 through 1954.

#### VI.

Plaintiff says the School District has made demand upon it for the payment of the taxes assessed against the property, which taxes it say (sic) it does not owe. The School District, although it has been repeatedly informed by the plaintiff that it is not the owner of the property and is holding the property under a lease not for a term of three years or more, and the property is not assess-

able for taxes, and that it is not indebted to the School District for any taxes in any amount, and that its leasehold estate in the property has never, in fact, been assessed for taxes, has heretofore threatened and is now threatening to, and will, unless enjoined and restrained by this court from so doing, institute a suit in a court of competent jurisdiction against the plaintiff to collect the taxes which it claims is due and owing to it.

[fol. 13]

#### VII.

Plaintiff says there is no law and no statute which levies any tax against the property or any interest of the plaintiff in the property, and that the School District is without any lawful right or authority or justification in law for taxing the property or for claiming that plaintiff is indebted to it in any sum for ad valorem taxes which have been assessed against the property.

#### VIII.

Plaintiff says it has no plain, speedy and adequate remedy at law to protect its rights; that in order for its rights to be protected, and in order for it to be protected from the accrual of interest, penalties and other costs, and attorneys' fees which the School District is claiming should be paid, or that will be incurred in connection with any suit instituted by the School District against it to collect the taxes, the School District, its officers, agents, servants, employees, and successors in office, and each and all of them, should, in law and in equity, and in good conscience, be permanently enjoined and restrained by this court from taking any action or instituting any suit against the plaintiff to collect from it the taxes, wilfully, unlawfully and illegally assessed against the property.

#### IX.

Plaintiff says that if the School District is permitted to assess and collect taxes from it on property which it does not own, or on property which is by law exempt from taxation, and which by law is not taxable, or which



has not in fact been taxed, and on which it owes no taxes, such will constitute the taking of private property for public use without just compensation, and without due process of law, and deny to plaintiff the equal protection [fol. 14] of the law in violation of Sections 17 and 19 of the Constitution of the State of Texas, and the 5th and 14th Amendments to the Constitution of the United States of America, and result in great and irreparable injury to the plaintiff.

### Second Cause of Action

Comes now the plaintiff and in the alternative, and in the alternative only, if for any reason it should be adjudged and determined that it is not entitled to recover upon its First Cause of Action herein alleged, and for its Second Cause of Action against the defendant, says:

#### I.

Plaintiff repeats the allegations contained in paragraphs I, II and III of its First Cause of Action.

#### II.

That on or about May 1, 1954, the School District, with the intent, purpose and design of collecting from this plaintiff the sum of \$305,346.73 as ad valorem taxes for the years 1949 through 1954, assessed for taxes as the property of Phillips Petroleum Company, all of that property set out and described in paragraph IV of its First Cause of Action, to which reference is made for a more full and complete description of said property.

#### III.

Plaintiff further says that if for any reason it is determined that it is the owner of the property above described, or whether the owner thereof or not, it owes any taxes thereon, or if for any reason it should be determined that its leasehold estate in the property is taxable, or has been taxed, all of which is not admitted, but is expressly denied, then and in that event, and in that event only, plaintiff says the value which the School Dis-

trict has placed on the property is arbitrary, fraudulent, [fol. 15] discriminatory, grossly excessive, exorbitant (sic) and illegal, and therefore void and not binding on this plaintiff.

#### IV.

Plaintiff says that on or about August 9, 1954, at the time and in the manner provided by law, it appeared before George Murphy, Carl Troutman and Homer Foreman, sitting as the legally appointed, constituted and acting Board of Equalization of the School District at Dumas, in Moore County, Texas. At that time plaintiff says it presented evidence to the Board of Equalization protesting the levying of any tax against the property, and pointing out to the board that the property assessed for taxes belonged to the Government; that the lease which it held on the property was not for a term of three years or more, and that its leasehold estate therein had not, in fact, been taxed, and that the assessed value of the property was grossly excessive.

#### V.

Plaintiff further alleges and shows that the Board of Equalization assessed and equalized all property within the School District for the year 1949 at the ratio of 10.06% of its value and placed a valuation on the property for tax purposes of \$3,169,790.00, thus fixing and determining the fair cash market value, or if it had no fair cash market value, the intrinsic value of the property assessed for taxes, at \$31,508,846.00, when in truth and in fact the property, for the year 1949, had an actual cash market value or intrinsic value no higher than \$9,000,000.00, and should not have been valued for tax purposes in excess of \$905,400.00, the leasehold estate therein being of no value; for the year 1950 at the ratio of 15.1% of its value, and placed a valuation on the property for [fol. 16] tax purposes of \$4,516,894.00, thus fixing and determining the fair cash market value, or it if (sic) had no fair cash market value, the intrinsic value of the property assessed for taxes, at \$29,913,205.00, when in truth and in fact the property, for the year 1950, had

an actual cash market value or intrinsic value no higher than \$9,500,000.00 and should not have been valued for tax purposes in excess of \$1,434,500.00, the leasehold estate therein being of no value; for the year 1951 at the ratio of 15.1% of its value, and placed a valuation on the property for tax purposes of \$4,168,091.00, thus fixing and determining the fair cash market value, or if it had no fair cash market value, the intrinsic value of the property assessed for taxes, at \$27,603,251.00, when in truth and in fact the property, for the year 1951, had an actual cash market value or intrinsic value no higher than \$9,000,000.00, and should not have been valued for tax purposes in excess of \$1,359,000.00, the leasehold estate therein being of no value; for the year 1952 at the ratio of 20.08% of its value, and placed a valuation on the property for tax purposes of \$5,335,387.00, thus fixing and determining the fair cash market value, or if it had no fair cash market value, the intrinsic value of the property assessed for taxes, at \$26,570,652.00, when in truth and in fact the property, for the year 1952, had an actual cash market value or intrinsic value no higher than \$8,500,000.00, and should not have been valued for tax purposes in excess of \$1,706,800.00, the leasehold estate therein being of no value; for the year 1953 at the ratio of 22.49% of its value, and placed a valuation on the property for tax purposes of \$5,232,366.00, thus fixing and determining the fair cash market value, or if it had no fair cash market value, the intrinsic [fol. 17] value of the property assessed for taxes, at \$23,265,300.00, when in truth and in fact the property, for the year 1953, had an actual cash market value or intrinsic value no higher than \$8,000,000.00, and should not have been valued for tax purposes in excess of \$1,799,200.00, the leasehold estate therein being of no value; for the year 1954 at the ratio of 25.42% of its value, and placed a valuation on the property for tax purposes of \$5,358,516.00, thus fixing and determining the fair cash market value, or if it had no fair cash market value, the intrinsic value of the property assessed for taxes, at \$21,079,921.00, when in truth and in fact the property, for the year 1954, had an actual cash market

value or intrinsic value no higher than \$7,500,000.00, and should not have been valued for tax purposes in excess of \$1,906,500.00, the leasehold estate therein being of no value.

Plaintiff says that by reason of all the matters and things above alleged, if the valuation determinations made by the Board are allowed to stand, plaintiff will be subjected to the payment of taxes, when in fact none are payable, or if any taxes are payable, to the payment of a grossly excessive amount of taxes.

## VI.

Plaintiff further alleges and shows to the court that to allow the valuations fixed by the Board of Equalization to stand and to compel this plaintiff to pay taxes on the basis of such values would violate Section 1, Article 8 of the Constitution of the State of Texas which provides that taxation shall be equal and uniform, and that all property be taxed in proportion to its value, and thus subject plaintiff to the payment of more taxes than it should pay, thus resulting in injury and damage to the [fol. 18] plaintiff, and deny this plaintiff due process and equal protection of the law.

## VII.

Plaintiff says that it has at all times been, and is now, ready, willing and able to pay all just, lawful and legal taxes which it owes to the School District.

## VIII.

Plaintiff further alleges and would show to the court that the defendant Dumas Independent School District, under a statute of the United States so providing, made application and received from the United States of America the sum of \$28,712.87 for the school year 1950-51; \$31,997.77 for the school year 1951-52; \$33,506.78 for the school year 1952-53; \$29,998.00 for the school year 1953-54. That as the basis for receiving such Federal aid, the defendant represented to the United States of America that the Cactus Ordnance Works properties, which they

are now attempting to assess and tax as the property of this plaintiff, was Federal property belonging to the United States of America and as such not taxable.

It is plaintiff's information and belief that, in addition to the payments above alleged, the defendant Dumas Independent School District has been allocated an additional sum of \$64,296.00 by the United States of America, acting through its Commissioner of Education. That this sum was applied for by the defendant Dumas Independent School District in the year 1952 and awarded to it by the United States of America in the year 1954 as a contribution by the United States of America for the cost of constructing additional school facilities necessitated by the existence of the Cactus Ordnance Works as federally owned, tax-exempt property within the School District, [fol. 19] which property the defendant Dumas Independent School District is seeking to tax against this plaintiff. That, although said sum of \$64,296.00 has not yet been received by the Dumas Independent School District, the District intends to and will receive the amount of money as applied for from the United States of America.

Wherefore, premises considered, plaintiff prays that citation be issued to the defendant as provided by law, commanding the defendant to appear and answer herein; that upon final hearing plaintiff have and recover judgment upon its First Cause of Action, forever, perpetually and permanently enjoining and restraining the defendant, its agents, servants, employees, officers, trustee and all other persons acting under defendant's control, direction or authority from collecting or attempting to collect, by suit or otherwise, any taxes, penalties or interest from this plaintiff by reason of the assessments of the described property or leasehold therein for the years 1949 to 1954 inclusive, and from ever placing upon the tax rolls of Dumas Independent School District for the purpose of collecting taxes from this plaintiff, the property described in this petition, or the leasehold estate therein, and that all taxes levied or assessed against this plaintiff for the years 1949 to 1954 inclusive be ordered cancelled and voided with prejudice to any reassessment.



Plaintiff further prays that if for any reason it is not entitled to recover upon its First Cause of Action as prayed, and only in that event, that it recover judgment upon its Second Cause of Action, cancelling and voiding the herein described assessments for the years 1949 to 1954 inclusive, and perpetually and permanently enjoining and restraining the defendant, its agents, servants, [fol. 20] employees, officers, trustees and all other persons acting under defendant's control, direction or authority from collecting or attempting to collect, by suit or otherwise, any taxes, penalties or interest from this plaintiff by reason of the above described assessments; but without prejudice to the defendant to reassess plaintiff upon a proper valuation of the property or the leasehold interest therein, if plaintiff be taxable in law thereupon. Plaintiff also prays for such other and further relief in law and in equity, to which it may be justly entitled, and that it recover its costs.

E. H. Foster, T. M. Blume, C. Rex Boyd, Attorneys  
for Phillips Chemical Company, Address: Post  
Office Box 1751, Amarillo, Texas.

Proof of Service (omitted in printing).

#### VERIFICATION

State of Texas,  
County of Potter.

Before Me, a Notary Public in and said County and State, personally appeared Clay D. Carrithers, who, being duly sworn, deposes and says:

Affiant has supervision over and is in charge of ad valorem tax matters, including assessments and payments, [fol. 21] of Phillips Chemical Company, plaintiff herein, in the Panhandle District in Texas, including the Dumas Independent School District, and is authorized to make Verification for and on behalf of plaintiff herein; affiant has read said First Amended Original Petition and knows of his own knowledge that the facts stated therein are true and correct. The reason why this Verification is

made by affiant and not by plaintiff or one of plaintiff's officers is that plaintiff is a foreign corporation and none of the officers of plaintiff resides within the jurisdiction of this court, and all of such officers are outside the State of Texas.

Clay D. Carrithers

Subscribed and Sworn to before me this 31st day of August, 1956.

Alice M. Vaughn, Notary Public in and for the State of Texas, County of Potter.

(Seal)

[File endorsement omitted]

[fol. 22]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

[Title omitted]

DEFENDANT'S FIRST AMENDED ORIGINAL ANSWER AND  
CROSS-ACTION—Filed September 14, 1956

To the Honorable Judge of Said Court:

Now comes the Dumas Independent School District, hereinafter referred to as Defendant, and files, this, its First Amended Original Answer to the Plaintiff's First Amended Original Petition heretofore filed herein, and its First Amended Cross-Action against the Plaintiff, Phillips Chemical Company, in lieu of its Original Answer and Cross-Action, and for such answer and cross-action would show unto the Court the following, to-wit:

# I.

The Defendant excepts to Plaintiff's Original Petition, and particularly to Paragraph VI of the First Cause of Action thereof, and says that the same is insufficient in law in that said Paragraph VI alleges only that the Defendant is threatening to institute a suit to recover

against the Plaintiff the taxes alleged in said petition, and said paragraph does not allege that said Defendant is threatening to levy upon the property of said Plaintiff, or that the collection of such taxes has been threatened or attempted by levy, and therefore said Plaintiff fails to state any grounds for equitable relief in the form of an injunction, but on the other hand, said Paragraph VI shows on its face that said Plaintiff has an adequate remedy at law, in that said Plaintiff could answer and [fol. 23] contest any suit filed by said Defendant against the said Plaintiff for collection of such taxes, wherefore said Defendant says that Plaintiff has failed to state a cause of action for injunction, of which special exception said Defendant prays judgment of the Court.

## II.

The Defendant excepts to the said Petition, and particularly to Paragraph VIII of the First Cause of Action thereof, and says that the same is insufficient in law, in that no facts are alleged showing that the Plaintiff does not have a plain, speedy and adequate remedy at law to protect its rights, and nowhere in said paragraph is it alleged that the rights of Plaintiff are that need protection of a court of equity, but on the other hand, the defendant says that all matters alleged by said Plaintiff in said Paragraph VIII are matters which could properly be presented as defenses in any suit brought by the Dumas Independent School District against the Plaintiff for the collection of such taxes, and that no facts are alleged showing any particular or special right that this Plaintiff has to invoke the equitable jurisdiction of this Court, of which special exception Defendant prays judgment of the Court.

## III.

And comes the Defendant and excepts specially to Paragraph VIII of the Second Cause of Action in said Plaintiff's original petition, and moves that the same be stricken from said pleading and not read to the jury, and not be considered for any purpose, and in this connection, these Defendants say that all of matters alleged in said



Paragraph VIII are immaterial, irrelevant, and prejudicial, in that any payments by the United States of America to the defendant, Dumas Independent School District, as a Federal contribution to education is a matter [fol. 24] between said school district and said government, and is of no consequence to the Plaintiff, and has no bearing upon this cause of action asserted by Plaintiff against the Defendant and has no bearing upon the taxability of the Cactus Ordnance Works, and says that such payments by the United States of America to said Defendant school district do not by any means establish taxability of said property, wherefore such allegations contained in said paragraph VIII should be stricken from said pleading, and not considered by this Court for any purpose, of which special exception Defendant prays judgment of the Court.

#### IV.

And comes the Defendant and excepts specially to said Plaintiff's Original Petition, in its entirety, and says that the same states no cause of action for injunction, in that it is nowhere shown in said petition that any irreparable damage would result to the said Plaintiff from any suit brought by the Defendant to collect the taxes alleged to be due, and nowhere is it stated in said petition that the Defendant is not able to respond in damages in the event any money damage should be done to said Plaintiff by reason of such suit, and nowhere is it shown that any damage other than money damage could possibly be done to said Plaintiff, wherefore said Plaintiff has failed to state a cause of action for injunction or equitable relief, of which special exception the Defendant prays judgment of the Court.

And not waiving the foregoing special exceptions, but continuing to insist thereon, but answering further if need be, comes the Defendant and shows unto the Court the following:

[fol. 25]

#### V.

Defendant admits that the property listed in Paragraph IV of the Plaintiff's First Amended Original Petition is

owned in fee simple by the United States of America, and that the said property is leased by the Plaintiff, Phillips Chemical Company, but Defendant denies that such property is not taxable for ad valorem taxes in the hands of said Phillips Chemical Company as lessee, and denies that the Defendant, in assessing the said property for taxes and placing the same on the tax rolls of the Dumas Independent (sic) School District, did so without any lawful right or authority to do so, and denies that such was done with the purpose, intent and design of willfully, unlawfully and illegally collecting from the Plaintiff taxes which are not due and owing; but on the other hand, the defendant says that such taxes as have been assessed against the said Plaintiff are in all respects proper and legal, and that the same constitute valid and outstanding obligations of the said Plaintiff, which the said Plaintiff owes to the Defendant, Dumas Independent School District. For a more complete statement of the grounds upon which said property is made taxable by law, reference is hereby made to the cross-action contained hereinafter in this pleading, all relevant parts are herein adopted and made a part of this answer.

## VI.

The Defendant denies specifically that the valuations which the Defendant, acting by and through the Board of Equalization of the Dumas Independent School District, placed upon the said property here in question are arbitrary, fraudulent, discriminatory, excessive, exorbitant, or illegal, but on the contrary, the defendant would show the Court that such valuations as were arrived at, and upon which the assessments for the respective years in question [fol. 26] were based, were arrived at only after a full hearing upon the said question, after due notice to the Plaintiff, and that such hearing and that such valuations as were there arrived at are in all respects legal, proper, and correct. In this connection, Defendant would show the Court that the hearing before the Board of Equalization of the Defendant, Dumas Independent School District, was extensive, that the same was transcribed and recorded by an official court reporter, and that the transcript of

the testimony at such hearing comprises 275 typewritten pages, and that in addition to such transcribed testimony, there were 144 pages of written exhibits introduced in evidence at such hearing, that the plaintiff, Phillips Chemical Company, appeared at such hearing by counsel, and presented approximately ten witnesses who testified and who introduced documentary evidence. That the defendant, Dumas Independent School District, at great expense in time and money, procured the services of two separate professional engineering and appraising firms who completely appraised the said Cactus Ordnance Works, from an engineering standpoint, in order to arrive at the true and correct value thereof, and that the testimony of such engineering experts was introduced before said Board of Equalization. That after such due consideration the said Board of Equalization did place upon said Cactus Ordnance Works the valuations for tax purposes in the amounts and for the years shown in Paragraph V of the Second Cause of Action of Plaintiff's First Amended Original Petition, and that such valuations were correct, and were in all respects legal and proper, and that the same constitute correct assessments of said property for the year shown.

[fol. 27]

#### VII.

Except as herein specifically admitted, the defendant denies each and every allegation of Plaintiff's Original Petition, and demands strict proof thereof.

#### VIII.

In connection with paragraph VIII of the Second Cause of Action of Plaintiff's First Amended Original Petition, and not waiving its foregoing special exceptions, but continuing to insist that such matters as are alleged in said paragraph VIII are irrelevant and immaterial, defendant would show the Court that a substantial portion of the funds received by Defendant from the United States Government, as alleged in said paragraph VIII, had no connection with the Cactus Ordnance Works, but were granted to the said Defendant by the said United States of America for purposes wholly unconnected with the

attendance in said Defendant's school of children whose parents were connected with the said Cactus Ordnance Works.

Wherefore, premises considered, the Defendant prays that each and all of its special exceptions hereinabove set forth be sustained, and that upon final hearing herein, plaintiff's suit be in all things dismissed as to said Defendant and that all relief prayed for by said Plaintiff be denied and that Plaintiff take nothing by its suit against the Defendant and Defendant further prays that it have its costs against the said Plaintiff; and Defendant further prays for such other and further relief, either general or special, whether at law or in equity, as it may show itself entitled to receive.

James W. Witherspoon, Wayne E. Thomas, John D. Aikin, Earnest L. Langley, Box 473, Hereford, Texas, Attorneys for Defendant.

Earnest L. Langley, of Counsel.

[fol. 28] *Duly sworn to by Earnest L. Langley, jurat omitted in printing.*

---

CROSS-ACTION OF THE DEFENDANT DUMAS INDEPENDENT  
SCHOOL DISTRICT

To the Honorable Judge of Said Court:

Now comes Dumas Independent School District, Defendant in the above entitled and numbered cause, and, as cross-plaintiff, files this its cross-action and counter-claim against the Plaintiff and cross-defendant, Phillips Chemical Company, and for such cross-action and counter-claim would respectfully show unto the Court the following:

I.

The Cross-Plaintiff, Dumas Independent School District, is a body politic and corporate, being an independent school district of the State of Texas, organized and existing under [fol. 29] and by virtue of the laws of the State of Texas, with the power to sue and be sued.

## II.

The Cross-Defendant, Phillips Chemical Company, is a private corporation, duly organized under the laws of the State of Delaware, and authorized by permit to do business within the State of Texas, where it is so doing business in Moore County, Texas, as lessee and operator of the Cactus Ordnance Works.

## III.

No other taxing units are impleaded herein, for the reason that this suit is not brought to establish or to foreclose a lien upon the property subject to taxation, but for the purpose only of establishing and obtaining a money judgment against the cross-defendant for taxes, penalties, interest, attorneys' fees and costs.

## IV.

That the said cross-plaintiff, Dumas Independent School District, during all of the years hereinafter set forth was such duly constituted and organized independent school district, and body politic and corporate, and as such was charged with public duties, and in order to perform the same was given the power to assess and levy all those certain taxes hereinafter set forth against the hereinafter described property.

## V.

That within the time and in the manner required by law, the Board of Trustees of the said Dumas Independent School District duly levied, for each year, at the rate fixed for each year, and hereinafter set forth, all those certain taxes hereinafter set forth upon and against all property included within the bounds of said school district, and the [fol. 30] owners thereof, which includes the property hereinafter set forth, and all things required by law to be done have been duly and legally performed by the proper officials.



## VI.

That said property hereinafter set forth and described was not rendered for taxes to said cross-plaintiff by said cross-defendant, in any of the years hereinafter set forth, and that the same was not assessed for taxes by the Tax Collector and Assessor of said Dumas Independent School District during the years set forth, for the reason that said Dumas Independent School District did not know at the time that such property was subject to taxation by said cross-plaintiff, but that during the year 1954, said cross-plaintiff was informed that such property was expressly made taxable in the hands of said cross-defendant by law, and therefore, in the manner provided by law, said cross-plaintiff, acting by and through its duly elected and acting Board of Trustees directed its Tax Assessor and Collector to place the said property upon the tax rolls for all previous years during which such property was made taxable by law in the hands of said cross-defendant, being the years 1949 through 1954, inclusive, and directed that said Tax Assessor and Collector assess all legal and proper taxes against said property for the years during which such property was made taxable by law; and all of such was done, in the manner provided by law and all things required by law to be done in connection with the placing of such property on the rolls for the previous years have been duly and legally performed by the proper officials.

## VII.

Cross-plaintiff would show the Court that the property hereinafter set forth and described is property owned in [fol. 31] fee simple by the United States of America, and that the same is leased by the United States of America to cross-defendant, Phillips Chemical Company, by that certain contract of lease entered into on July 22, 1948, by the Secretary of the Army, representing the United States of America, and acting by and through R. C. Crawford, Major General, Acting Chief of Engineers, as lessor, and the Phillips Petroleum Company of Bartlesville, Oklahoma, as lessee, the interest of said lessee having been duly assigned to the Phillips Chemical Company, cross-defendant herein.

That such lease was executed by virtue of authority contained in the Act of Congress approved August 5, 1947, being Public Law 364 of the 80th Congress, and the Act of Congress approved July 2, 1940, being 54 Stat. 712, as continued in effect by the Act of Congress approved June 5, 1942, being 56 Stat. 316.

### VIII.

Said hereinafter described property, although held and owned by the United States of America, is subject to taxation by this cross-plaintiff, Dumas Independent School District, under one or more of the following statutes, or other laws or statutes not herein named, to-wit:

(a) Article 5248 of the Revised Civil Statutes of the State of Texas, as amended by the Acts of the 1950 Legislature, providing that when lands owned by the United States are used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in conduct of any private business or enterprise, shall be subject to taxation by the State of Texas and by its political subdivisions.

(b) An Act of Congress approved August 5, 1947, Public Law 364, 80th Congress, 10 U.S.C.A. 1270-1270d, which was the law by virtue of which the lease here in question was made, as provided in said lease, and which said Act of Congress provides specifically that the lessee's interest in such leases shall be made subject to State or local taxation.

[fol. 32] (c) Section 1 of Article VIII of the Constitution of the State of Texas, which provides that taxation shall be equal and uniform, and that all property in this state shall be taxed in proportion to its value. This constitutional provision was carried forward into Article 7145 of the Revised Civil Statutes of Texas.

(d) Article 7173 of the Revised Civil Statutes of Texas, which provides that property held under a lease for a term of three years or more, that is exempt by law

from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation as the property of the person so holding the same under such lease.

- (e) Articles 7205, and 7207, Revised Civil Statutes of Texas, both of which provide for the assessment of taxes on property which has not been properly rendered for taxes in prior years.
- (f) Articles 1047 and 2791 of the Revised Civil Statutes of Texas, providing for the assessment of taxes in prior years.
- (g) Chapter 41 of Title 122, of the Revised Civil Statutes of Texas, Article 7346 et seq., providing for the assessment and collection of taxes on property omitted from the rolls in prior years.
- (h) Articles 2784 and 2785 and 2790 of the Revised Civil Statutes of Texas, providing for the levy of maintenance and bond taxes by Independent School Districts in the State of Texas.

## IX.

All of the elections, assessments, levies, and other actions of any and all kinds required by any or all of the statutes and acts of Congress set forth in the immediately preceding paragraph have been done and performed by the proper officials, in the way and manner required by law, and all conditions precedent to the assessment, levy and collection of the taxes herein mentioned have been dully (sic) and legally complied with by said cross-plaintiff, Dumas Independent School District acting by and through its duly acting and qualified officers and officials.

## X.

Cross-plaintiff would further show the Court that prior to the assessment of the taxes hereinafter set forth on the property hereinafter described, said cross-plaintiff, Dumas [fol. 33] Independent School District, duly notified the



cross-defendant, Phillips Chemical Company, that said cross-plaintiff had determined that such property was subject to taxation for the years in question, and requested said cross-defendant to render the said property for taxes, and requested a list of said property, but said cross-defendant refused to list such property and render the same for taxes for any years, after which such rendition was made by said cross-plaintiff, as required by law. That immediately upon assessing such property for taxes, said cross-plaintiff notified said cross-defendant of such assessment, gave notice to said cross-defendant of the hearing to be held by the Board of Equalization of said cross-plaintiff and said cross-defendant appeared at such meeting of said Board of Equalization, wherein, as above alleged, a full and complete hearing was had on said question of valuation and after such hearing and the introduction of all evidence that was brought by either cross-plaintiff or cross-defendant, said Board of Equalization duly adjusted the valuation of said property, and the Tax Assessor and Collector for said cross-plaintiff thereupon completed his assessment list and gave notice of the intention of said cross-plaintiff to collect said taxes to the said cross-defendant. Such property was, in all respects, duly, legally and properly assessed for taxation by the Assessor and Collector of taxes of the said cross-plaintiff, Dunias Independent School District, as required by the statutes of the State of Texas.

## XI.

That the property on which the taxes were assessed and levied, as herein set forth, is the leasehold interest of the plaintiff in that property known as the Cactus Ordinance Works, fee title to which is in the United States, [fol. 34] and more particularly described in Plaintiff's First Amended Original Petition, and reference to which is hereby made for a more complete description thereof, together with all additions thereto, and all appurtenances thereto.

## XII.

That for the year 1949, the actual market value of the said above described property, as found by the Board of Equalization, was \$31,508,845.00; that in said year property in said school district was assessed at 10.06% of its market value and that the assessed value of such property for said year was \$3,169,789.00; that the tax rate for said year levied by said cross-plaintiff, Dumas Independent School District was \$1.00 per \$100.00 of valuation, making a total tax due on said property for said year of \$31,697.89; that there is due and owing on said taxes the statutory penalty and interest charge from the date of delinquency until paid. That said cross-defendant became liable and bound to pay and it became its duty to pay to cross-plaintiff all of said taxes, penalties and interest hereinabove set forth; but notwithstanding the demand of cross-plaintiff therefor, cross-defendant has wholly failed and refused and still fails and refuses to pay the same or any part thereof to the damage of said cross-plaintiff in the sum of all of said taxes, penalties and interest.

## XIII.

That for the year 1950, the actual market value of the said above described property, as found by the Board of Equalization, was \$29,913,209.00; that in said year property in said school district was assessed at 15.10% of its market value and that the assessed value of such property for said year was \$4,516,894.00; that the tax rate for said year levied by cross-plaintiff, Dumas Independent School District was \$1.00 per \$100.00 of valuation, making [fol. 35] a total tax due on said property for said year of \$45,168.94; that there is due and owing on said taxes the statutory penalty and interest charges from the date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-plaintiff all of said taxes, penalties and interest hereinbefore set forth; but notwithstanding the demand of cross-plaintiff therefor, cross-defendant has wholly failed and refused and still fails and refuses to pay the same or any part thereof, to the damage of cross-plaintiff in the sum of all said taxes, penalties and interest.

## XIV.

That for the year 1951, the actual market value of the said above described property, as found by the Board of Equalization, was \$27,603,251.00; that in said year property in said school district was assessed at 15.10% of its market value and that the assessed value of such property for said year was \$4,168,091.00; that the tax rate for said year levied by said cross-plaintiff, Dumas Independent School District was \$1.00 per \$100.00 of valuation, making a total tax due on said property for said year of \$41,680.91; that there is due and owing on said taxes the statutory penalty and interest charges from the date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-plaintiff all of the taxes, penalties and interest hereinbefore set forth; but notwithstanding the demand of cross-plaintiff all of said taxes, penalties and interest herein-refused, and still fails and refuses to pay the same or any part thereof, to the damage of said cross-plaintiff in the sum of all of said taxes, penalties and interest.

[fol. 36]

## XV.

That for the year 1952, the actual market value of the said above described property, as found by the Board of Equalization, was \$26,570,648.00; that in said year property in said school district was assessed at 20.08% of its market value and that the assessed value of such property for said year was \$5,335,387.00; that the tax rate for said year levied by cross-plaintiff, Dumas Independent School District was \$1.00 per \$100.00 of valuation, making a total tax due on said property for said year of \$53,353.87; that there is due and owing on said taxes the statutory penalty and interest charges from the date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-plaintiff all of said taxes, penalties and interest hereinbefore set forth; but notwithstanding the demand of cross-plaintiff therefor, cross-defendant has wholly failed and refused, and still fails and refuses to pay the same or any part thereof, to the damage of

said cross-plaintiff in the sum of all of said taxes, penalties and interest.

## XVI.

That for the year 1953, the actual market value of the said above described property, as found by the Board of Equalization, was \$23,265,298.00; that in said year property in said school district was assessed at 22.49% of its market value and that the assessed value of such property for said year was \$5,232,366.00; that the tax rate for said year levied by cross-plaintiff, Dumas Independent School District was \$1.26 per \$100.00 of valuation, making a total tax due on said property for said year of \$65,927.81; that there is due and owing on said taxes the statutory penalty and interest charges from the [fol. 37] date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-plaintiff all of said taxes, penalties and interest hereinabove set forth; but notwithstanding the demand of cross-plaintiff therefor cross-defendant has wholly failed and refused, and still fails and refuses to pay the same or any part thereof, and

to the damage of said cross-plaintiff in the sum of all of said taxes, penalties and interest.

## XVII.

That for the year 1954, the actual market value of said above described property, as found by the Board of Equalization, was \$21,079,918.00; that in said year property in said school district was assessed at 25.42% of its market value and that the assessed value of such property for said year was \$5,358,516.00; that the tax rate for said year levied by cross-plaintiff, Dumas Independent School District was \$1.26 per \$100.00 of valuation, making a total tax due on said property for said year of \$67,517.30; that there is due and owing on said taxes the statutory penalty and interest charges from the date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-

plaintiff all of said taxes, penalties and interest hereinbefore set forth; but notwithstanding the demand of cross-plaintiff therefor, cross-defendant has wholly failed and refused, and still fails and refuses to pay the same or any part thereof, to the damage of said cross-plaintiff in the sum of all of said taxes, penalties and interest.

### XVIII.

That for the year of 1955, the actual market value of the said above described property, as found by the Board [fol. 38] of Equalization was \$.....; that in said year property in said school district was assessed at .....% of its market value and that the assessed value of such property for said year was \$.....; that the tax rate for said year levied by cross-plaintiff, Dumas Independent School District was \$..... per \$100.00 of valuation, making a total tax due on said property for said year of \$.....; that there is due and owing on said taxes the statutory penalty and interest charges from the date of delinquency until paid. That said cross-defendant became liable and bound to pay, and it became its duty to pay to cross-plaintiff all of said taxes, penalties and interest hereinabove set forth; but notwithstanding the demand of cross-plaintiff therefor, cross-defendant has wholly failed and refused, and still fails and refuses to pay the same or any part thereof, and to the damage of said cross-plaintiff in the sum of all of said taxes, penalties and interest.

### XIX.

That under the provisions of Section 6 of Article 7345b, Texas Revised Civil Statutes, the cross-plaintiff is entitled to attorneys' fees in the sum of 10% of all taxes, penalty, and interest due, together with all costs of suit, for which cross-plaintiff here sues.

### XX.

Cross-plaintiff further shows the Court that other taxes, penalty and interest, as well as additional attorneys' fees

and costs, may accrue before judgment, and cross-plaintiff here sues for all such items as may become legally due and payable before judgment.

## XXI.

Cross-plaintiff would further show unto the Court that [fol. 39] the Board of Trustees of said Dumas Independent School District authorized and directed this suit to be brought against the cross-defendant, and that the attorney or attorneys whose name or names are signed hereto are legally authorized and empowered to institute and prosecute this action on behalf of said cross-plaintiff.

Wherefore, cross-plaintiff prays that cross-defendant take due notice of this amended cross action, as required by law, and that on final hearing it have judgment against said cross-defendant, Phillips Chemical Company, for all said taxes, penalties, interest, attorneys' fees, and costs above set forth and alleged, for all costs of suit, and for all other relief, both general and special, either at law or in equity, to which said cross plaintiff may show itself entitled, for all of which it will ever pray.

James W. Witherspoon, Wayne F. Thomas, John D. Aikin, Earnest L. Langley, Pox 473, Hereford, Texas, Attorneys for cross-plaintiff, Dumas Independent School District.

Earnest L. Langley, of Counsel.

[File endorsement omitted]

[fol. 40]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

[Title omitted]

REQUEST FOR ADMISSION—Filed June 18, 1955

Phillips Chemical Company, Plaintiff, hereby requests Dumas Independent School District, Carl Troutman, Home



Foreman, Byron W. Smith, George Burnett, and George Murphy, individually, and as Trustees of Dumas Independent School District, and John R. Powell, individually, and in his capacity as Tax Assessor and Collector for Dumas Independent School District, Defendants, to admit the genuineness of the following documents:

(1) Lease between the Secretary of the Army of the United States of America and Phillips Petroleum Company, dated July 22, 1948, consisting of 26 pages, along with an Exhibit "A" thereto of 5 pages and a plat, photostatic copy of which Lease with its Exhibit is attached hereto as Exhibit Number 1.

(2) Assignment of Lease and Acceptance from Phillips Petroleum Company, Assignor, to Phillips Chemical Company, Assignee, dated July 30, 1948, consisting of 3 pages, photostatic copy of which is attached hereto as Exhibit Number 2.

Phillips Chemical Company, Plaintiff, further requests the above named defendants to admit the truth of the following matters of fact:

1. That the plaintiff, Phillips Chemical Company, has been, since July 30, 1948, and still is, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and having a permit to [fol. 41] do business in the State of Texas.

2. That Phillips Chemical Company, from August 16, 1948, to the present time, has operated within the Dumas Independent School District a plant for the production of ammonia and or nitric acid, which is commonly referred to as the Cactus Plant or the Cactus Ordnance Works.

3. That the defendants have assessed or attempted to assess for the years 1949 to 1954, inclusive, against Phillips Chemical Company the property described in Paragraph 7 of Plaintiff's Original Petition filed in this cause.

4. That the land described in Paragraph 7 of Plaintiff's Original Petition in this cause was acquired by condem-

nation proceedings by the United States of America, instituted in the United States District Court for the Northern District of Texas, Amarillo Division, against certain lands in Moore County, Texas, and being Cause Number 259 Civil on the Docket of said Court.

5. That in the condemnation suit identified in the preceding request, title was vested in the United States of America as to all of the lands described in Plaintiff's Petition and in the Cross-Action of Dumas Independent School District, except the tract of land in Moore County, Texas, described as follows:

"3. Part of Acquisition Tract No. 10: All that part of Section 29, Blk. 2-T, T. & N. O. RR Survey, lying East of U. S. Highway No. 287, containing 451.18 acres, more or less."

by a Declaration of Taking filed November 21, 1942, with a judgment thereon entered November 23, 1942.

6. That in the condemnation suit identified in request No. 4, title was vested in the United States of America as to the tract of land in Moore County, Texas, described as follows:

[fol. 42] "3. Part of Acquisition Tract No. 10: All that part of Section 29, Blk. 2-T, T. & N. O. RR Survey, lying East of U. S. Highway No. 287, containing 451.18 acres, more or less."

by a Declaration of Taking No. 2 filed December 26, 1942, with a judgment thereon entered on December 28, 1942.

7. That the United States of America owns the property upon which the defendants seek to collect taxes from the plaintiff as described in Paragraph 7 of Plaintiff's Original Petition, and that the United States of America has owned such property during all of the years 1949 to 1954, inclusive.

8. That the Dumas Independent School District received from the United States of America, as Federal aid, ap-



proximately the sums of money as indicated for the following school years:

(a) 1950-1951: \$28,712.87

(b) 1951-1952: \$31,997.77

(c) 1952-1953: \$33,506.78

(d) 1953-1954: \$29,998.00

9. That the sums of money listed in request Number 8 hereinabove, or such approximate amounts, were received under the provisions of Public Law 874, Chapter 1124, Laws of the 81st Congress, Second Session, 1950, or Title 20, Chapter 13, United States Code Annotated.

10. That the Dumas Independent School District made written applications for Federal aid under the statutes of the United States of America embraced in 20 U.S.C.A., Chapter 13 for the years 1950 to 1954, inclusive.

11. That the Cactus Ordnance Works was stated in such applications to be Federal property.

12. That of the sums received by Dumas Independent School District as listed in request Number 8, entitlement was obtained by reason of children either residing upon the lands described as Cactus Ordnance Works or residing [fol. 43] with parents employed on Cactus Ordnance Works, as to the following proportions of such sums received for each school year listed:

A. 1950-1951:

(1) Over 90%

(2) Over 75%

(3) Over 65%

(4) Over 50%

(5) Over 25%

B. 1951-1952:

(1) Over 90%

(2) Over 75%

- (3) Over 65%
- (4) Over 50%
- (5) Over 25%

C. 1952-1953:

- (1) Over 90%
- (2) Over 75%
- (3) Over 65%
- (4) Over 50%
- (5) Over 25%

D. 1953-1954:

- (1) Over 90%
- (2) Over 75%
- (3) Over 65%
- (4) Over 50%
- (5) Over 25%

13. That the Dumas Independent School District applied for and received over half of the amounts listed in Paragraph 8 upon the prediction that the Cactus Ordnance Works was Federal property as defined in 20 U.S.C.A., Chapter 13.

14. That Dumas Independent School District applied for Federal educational aid under the provisions of Title 20, Chapter 14, U.S.C.A.

15. That the Dumas Independent School District has within the past year received the sum of \$64,296.00, or thereabouts, under its application described in the preceding request.

[fol. 44] 16. That in its application or applications referred to in the two immediately preceding requests, Dumas Independent School District represented that Cactus Ordnance Works was Federal property within the meaning of 20 U.S.C.A., Chapter 14.

17. That most of the sum of \$64,296.00 received by Dumas Independent School District as indicated in the

preceding three requests was based upon the existence of Cactus Ordnance Works as "Federal Property" within the meaning of 20 U.S.C.A., Chapter 14.

18. That Phillips Chemical Company has operated Cactus Ordnance Works under the Lease Agreement attached as Exhibit Number 1 of this Request during all of the years 1949 to 1954, inclusive.

You are advised that this Request for Admissions is made under the provisions of Rule 169 of the Texas Rules of Civil Procedure and that each of the matters of which an admission is requested shall be deemed admitted unless a sworn statement is delivered to Phillips Chemical Company or its attorney on or before eleven (11) days after service upon you of this Request, as is provided in that Rule.

E. H. Foster, C. Rex Boyd, T. M. Blume, Attorneys  
for Phillips Chemical Company, First National  
Bank Building, Eighth and Tyler Streets, Post  
Office Box 1751, Amarillo, Texas.

T. M. Blume; Of Counsel.

I certify that the above and foregoing Request for Admissions, together with Exhibits Numbers 1 and 2\* attached, was served on James W. Witherspoon, Wayne E. Thomas, John D. Aikin, and Earnest L. Langley, attorneys [fol. 45] for the defendants named in this cause, by delivering a copy thereof to such attorneys by registered mail with postage prepaid, addressed to Post Office Box Number 473, Hereford, Texas, and mailed this 17th day of June, 1955.

T. M. Blume

[File endorsement omitted]

\* The above mentioned Exhibits Numbers 1 and 2 were not copied in this Transcript, but are included in the Statement of Facts at Pages 8 and 44.

Hazel Haile  
District Clerk, Moore County, Texas

[fol. 46]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS

[Title omitted]

REPLY TO REQUEST FOR ADMISSIONS—Filed July 11, 1955

Now come the defendants in the above entitled and numbered cause, acting by and through their duly authorized attorneys of record, and in response and reply to the request for admissions served upon said defendants by mail on the 17th day of June, 1955, make and file the following answer, to-wit:

## I.

In response to the request to admit the genuineness of a certain lease between the Secretary of the Army of the United States of America and Phillips Petroleum Company, and an assignment of such lease from Phillips Petroleum Company to Phillips Chemical Company, the defendants say that it is the understanding of such defendants that the Phillips Chemical Company operates the Cactus Ordnance Works, under the terms of a lease which was assigned to said Phillips Chemical Company by the Phillips Petroleum Company, which was the original lessee from the United States of America; but none of the defendants, and none of the officers, agents or attorneys of said defendants know of their own knowledge whether or not the photostatic copy of a lease and an assignment attached to the request for admissions is in fact a copy of the original lease and assignment, and the information as to the genuineness of such lease and assignment is exclusively within the knowledge of the plaintiff and its officers, agents and attorneys, insofar as the parties to this suit are concerned; so that defendants must answer that they are unable to admit or deny the genuineness of such instruments.

## II.

In response to each of the numbered requests for admissions so served upon the defendants by the plaintiff, these defendants say:

1. Admitted.

2. Admitted.

3. Admitted.

4. Although the defendants understand that the land referred to in Request No. 4 was acquired by the United States of America and is presently owned by said United States of America, none of the defendants have any knowledge as to the exact means so used by the said United States of America in acquiring such lands, and said defendants are therefore unable to admit or deny request No. 4.

5. To request No. 5, the defendants make the same answer that was made to request No. 4.

6. To request No. 6, the defendants make the same answer that was made to request No. 4.

7. It is the understanding of the defendants that the United States of America does own the property referred to in request No. 7, although it should be noted that some of such land is owned in fee while other tracts of such land are owned by easement only; and further the defendants say that there is some question as to the exact extent of the ownership of the United States of America in both the lands so referred to and in certain improvements and buildings and equipment erected on said lands, it being the understanding of the defendants that the plaintiff is the owner of some of such improvements, buildings, and equipment; [fol. 48] and further, the matter of ownership of a multi-million dollar plant being a matter of such complexity, and the defendant not being in possession of full information concerning such ownership, the said defendants state that they are unable to admit or deny request No. 7.

8. While not all of the amounts shown in request No. 8 are exactly accurate, they are essentially accurate, and the defendants admit that such approximate sums were re-

ceived in the years indicated as Federal Aid by the defendant, Dumas Independent School District.

9. Admitted.

10. Admitted.

11. Admitted.

12. The defendants say, in response to request No. 12, that said request is an improper request, in that it attempts to require the defendants to elect between one of five choices of answers to each of four different questions, and that it is not the type of request which can be admitted or denied; so that the defendants move the court to require the plaintiff to be more specific in its requests for admissions, in order that the defendants can frame a proper answer to such requests.

13. Admitted.

14. Admitted.

15. Admitted.

16. Admitted.

17. The defendants are unable to specifically admit or deny request No. 17, for the reason that the word "most" is vague and indefinite, but said defendants do say that the pupils upon whose attendance in the Dumas Schools the applications referred to were made were connected with either Cactus Ordnance Works or other properties, and that [fol. 49] more than one-half of such students were connected with Cactus Ordnance Works, within the meaning of the applicable federal laws.

18. It is the understanding of these defendants that the Phillips Chemical Company has operated Cactus Ordnance Works during the years inquired about in request No. 18, and it is likewise the understanding of the defendants that such operation was under the said lease agree-



ment, but the defendants say that they have no actual knowledge of the facts involved, and therefore are unable to admit or deny said request No. 18.

### III.

Except as specifically admitted in the foregoing portion of this reply, these defendants deny each and every request for admissions contained in the said request for admissions served upon the defendants by the plaintiff.

Earnest L. Langley, Attorney for defendants.

*Duly sworn to by Earnest L. Langley, jurat omitted in printing.*

[fol. 50] . [File endorsement omitted]

[fol. 51]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

[Title omitted]

ORDER ON PLAINTIFF'S MOTION FOR SEPARATE TRIAL—  
September 14, 1956 .

On this 14th day of September, A. D. 1956, in the above entitled and numbered cause came on to be heard and considered the Motion of the Plaintiff, Phillips Chemical Company, for a separate trial of the issues made in the first cause of action of its First Amended Original Petition and in Paragraph 4 of its First Amended Original Answer to the Cross Action of the Defendant Dumas Independent School District. And came all of the parties by counsel and the Court, having heard and considered the Motion, the Affidavit in support thereof, and the argument of counsel thereon, and being of the opinion that said Motion should be granted;

It Is Therefore Ordered, Adjudged and Decreed that the Motion of the Plaintiff, Phillips Chemical Company, be and the same is hereby granted.

And It Is Further Ordered that the issues made in the first cause of action of the First Amended Original Petition of the Plaintiff and the Cross-action of the defendant and in Paragraph 4 of the First Amended Original Answer to the Cross Action of the Defendant be separately numbered and docketed on the docket of the Court for all purposes as Cause No. 2708-A.

And all parties in said cause having waived a trial by jury, It Is Ordered that the trial of Cause No. 2708-A be set down for trial before the Court on September 18, 1956, at 10:00 o'clock A. M.

[fol. 52] To all of which order, ruling and decision of the Court the defendant, Dumas Independent School District, duly excepted.

Plaintiff excepts to the language added as being broader than the motion and as indicating the trial of issues which will not be tried as per the Court's actual ruling.

Thomas M. Blume

Harry H. Schultz, Judge, District Court of Moore County, Texas.

[File endorsement omitted]

[fol. 53]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

[Title omitted]

CORRECTION ORDER--November 12, 1956

Upon Motion of Plaintiff Phillips Chemical Company, and in order that the record may correctly reflect the true facts, it is the order of the Court that the Order of September 14, 1956, granting to plaintiff a separate trial of all the issues as made in the first cause of action of its First Amended Original Petition, be and the same is hereby corrected in the following particulars:

It Is Ordered, Adjudged and Decreed that the Motion of Phillips Chemical Company for a separate trial of all the issues as made in its first cause of action be and the same is hereby granted, and that the issues for which a separate trial is ordered, be separately numbered and docketed on the docket of this court for all purposes as Cause No. 2708-A.

To all of which order, ruling and decision of the Court, the Defendant Dumas Independent School District excepted.

Done in open court this the 12th day of November, 1956.

Harry H. Schultz, Judge, District Court, Moore County, Texas.

Approved: as to form: T. M. Blume, Attorney for Phillips Chemical Company.

As to form: James W. Witherspoon, Attorney for Dumas Independent School District.

[File endorsement omitted]

[fol. 54]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

[Title omitted]

JUDGMENT—December 5, 1956

On this, the 18th day of September, 1956, came on to be heard the above entitled and numbered cause wherein Phillips Chemical Company, a corporation, is plaintiff, and Dumas Independent School District, a body politic and corporate, with power to sue and be sued, is defendant, and came all the parties in person and by their attorneys and announced ready for trial. And a jury having been waived by all parties, and all matters of law as well as of fact having been submitted to the Court and the Court having heard and considered the pleadings, the evidence and argument of counsel thereon, and being now fully advised in

the premises and being of the opinion that the law and the facts are with the plaintiff, Phillips Chemical Company, and against the defendant, Dumas Independent School District, and plaintiff, Phillips Chemical Company, is not liable for any taxes on the property known as Cactus Ordnance Works for the tax year 1949, and for the tax year 1950, beginning with January 1, 1950, through March 16, 1950:

It Is Therefore Ordered, Adjudged and Decreed that all taxes assessed and levied against the Phillips Chemical Company for the taxable year 1949 and the taxable year 1950, beginning January 1, 1950, through March 16, 1950, on the property known as Cactus Ordnance Works, described hereinafter, be and the same are hereby annulled, cancelled and set aside and held for naught, with prejudice to any reassessment.

[fol. 55] It Is Further Ordered, Adjudged and Decreed that the defendant, Dumas Independent School District, its officers and trustees, agents, servants, employees, and attorneys, ought to be and they are hereby forever and perpetually enjoined and restrained from in any way or in any manner assessing, collecting, or attempting to collect taxes or filing or attempting to file or institute any suit or action at law or in equity in any court to collect from the plaintiff, Phillips Chemical Company, any taxes upon the property known as Cactus Ordnance Works, and described as follows:

All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

That part of Sections 20, 28, 29, 36, 37, and 38, Block 2-T, T. & N. O. R. R. Survey, Moore County, Texas, being 1538.31 acres, more or less, described in 7 Tracts as follows:

1. Acquisition Tract 18; All that part of Section 20, Block 2-T, T. & N. O. R. R. Survey, Moore County, Texas, lying East of U. S. Highway No. 287 and South of the County line between Moore and Sherman Counties, containing 105.87 acres, more or less.

2. Part of Acquisition Tract 12: The W. 891 ft. of the SW/4 of Section 28, Block 2-T, T. & N. O. R. R. Survey, containing 54.00 acres, more or less.

3. Part of Acquisition Tract No. 10: All that part of Section 29, Block 2-T, T. & N. O. R. R. Survey, lying East of U. S. Highway No. 287, containing 451.18 acres, more or less.

4. 222.07 acres of Acquisition Tract No. 1; being all that part of Section 36, Block 2-T, T. & N. O. R. R. Survey, lying East of Texas State Highway No. 9 (same as U. S. Highway No. 287), except 0.38 acres, described as:

Beginning at a point in the East R. O. W. line of State Highway No. 9, said point being 2507 ft. N. of its intersection with the South line of Section 36; thence No.  $89^{\circ} 41'$  E., 550 ft.; thence N.  $0^{\circ} 19'$  E., 30 ft.; thence S.  $89^{\circ} 41'$  W., 550 ft. to a point in the East R. O. W. line of said Highway No. 9; thence S.  $0^{\circ} 19'$  W., a distance of 30 ft. along the East R. [fol. 56] O. W. line of Highway No. 9, to the point of beginning.

And also except 1.78 acres of land for site occupied by Laundry Building described as:

Beginning at a point S.  $62^{\circ} 30'$  W., 1602.4 ft. and S.  $47^{\circ}$  E., 239.2 ft. of the N.E. corner of said Section 36; thence S.  $47^{\circ} 42'$  E., 595 ft.; thence S.  $42^{\circ} 18'$  W., 130.4 ft.; thence N.  $47^{\circ} 42'$  W., 595.5 ft.; thence N.  $47^{\circ} 34'$  E., 130.4 ft. to point of beginning.

5. Part of Acquisition Tract No. 2, containing four parcels of land described as:

- (a) Beginning at a point 106 ft. N. of SE corner of Section 37, Block 2-T, T. & N. O. R. R. Survey, thence N. along the East line of said Section 37; thence S.  $89^{\circ} 42'$  W., 1205 ft.; thence S.  $0^{\circ} 11'$  E., 848 ft.; thence N.

S. 42' E.; 1205 ft.; to point of beginning, containing 23.50 acres, more or less.

(b) Beginning at the NW corner of Section 37, Block 2-T, T. & N. O. R. R. Survey, thence S. 0° 14' E., 1466.66 feet along the W. line of said Section 37; thence N. 89° 46' E., 891 ft.; thence N. 0° 14' W., 1466.66 ft. to N. line of said Section 37; thence W. 891 ft. along the N. line of said Section 37 to point of beginning, containing 30.00 acres, more or less.

(c) A tract of land in Section 37, Block 2-T, T. & N. O. R. R. Survey, 150. in width being 75 ft. on each side of a center line described as: Beginning at a point 891 ft. E. and S., 0° 14' E., 1166.66 ft. from the NW corner of Section 37, thence S. 38° E., 2390 ft.; thence N. 83° E., 360 ft.; thence S. 47° E., 1950 ft. to a point, said point being 1165 ft. W. and 954 ft. N. of the SE corner of said Section 37, and containing 15.90 acres, more or less.

(d) Beginning at a 1" iron pipe in the West line of Section 37, Block 2-T, T. & N. O. R. R. Survey, said point being 105 ft. N. of the SW corner of said Section; thence N. along said Section line 384 ft. to a point in the Section line marked by 1" iron pipe; thence S. 44° 20' E., 538.9 ft. to a point in property line fence marked with 1" iron pipe; thence in a Westerly direction 378.1 ft. to point of beginning, and containing 1.66 acres, more or less.

6. Acquisition Tract No. 3: The NW 4 and the S/2 of Section 38, Block 2-T, T. & N. O. R. R. Survey, except 6.60 acres in the SE corner of the S/2 of Section 38, lying E. of County Road conveyed to C. R. I. & G. R. R. Co., by instrument recorded in Vol. 46 at Page 59, Deed Records of Moore County, Texas, and containing 473.40 acres, more or less.

7. Acquisition Tract No. 4: The NE 4 of Section 38, Block 2-T, T. & N. O. R. R. Survey, containing [fol. 57] 460.00 acres, more or less.



### DESCRIPTION OF EASEMENT AREAS

That part of Sections 20, 21, 27, 28 and 37, Block 2-T, T. & N. O. R. R. Survey, Sherman and Moore Counties, Texas, being 56.00 acres, more or less, described in 23 Tracts as follows:

1. A water pipe line, double electric transmission line and hardsurfaced road Easement 105 ft. in width in Section 20, Block 2-T, T. & N. O. R. R. Survey, being 52.5 ft. on each side of a center line described as:

Beginning at a point 1210 ft. N. of the SE corner of said Section 20, Block 2-T, T. & N. O. R. R. Survey, thence N. 30° W., 4267 ft. to a point 50 ft. past Water Well No. 6.

2. A water pipe line, double electric transmission line and hardsurfaced road Easement 105 ft. in width in Section 21, Block 2-T, T. & N. O. R. R. Survey, being 52.5 ft. on each side of a center line described as:

Beginning at a point 560 ft. E. of the SW corner of said Section 21, Block 2-T, T. & N. O. R. R. Survey, thence N. 263 ft. to a point; thence N. 30° W., 1123 ft. to the West line of said Section 21, and 1210 ft. N. of SW corner thereof.

3. An electric transmission line Easement 15 ft. in width in Section 21, Block 2-T, T. & N. O. R. R. Survey, being 7.5 ft. on each side of a center line, described as:

Beginning at a point 200 ft. N. of the SE corner of said Section 21, Block 2-T, T. & N. O. R. R. Survey, thence in a Westerly direction 4793 ft. to intersection with a double electric transmission line, at a point 256 ft. N. and 510 ft. E. of SW corner of said Section 21.

4. A water well, wellhouse and transformer-station Easement in Section 21, Block 2-T, T. & N. O. R. R. Survey, said easement covering an area within a radius of 150 ft. from the center of existing Water Well No. 4, which is N. 49° E., 700 ft. from the SW corner of said Section 21.

5. A hard-surfaced road Easement 60 ft. in width being 30 ft. on each side of a center line described as:

Beginning at a point 91 ft. N. of SW corner of said Section 21, Block 2-T, T. & N. O. R. R. Survey, thence N.  $86^{\circ} 33' 45''$  E., 614.8 ft.; thence S.  $81^{\circ} 39'$  E., 822 ft. to the South line of said Section 21, and 1510 ft. E. of the SW corner thereof.

[fol. 58] 6. A water well, wellhouse and transformer station Easement for Well No. 3, in Section 22, Block 2-T, T. & N. O. R. R. Survey, described as:

Beginning at a point 250 ft. E. of SW corner of said Section 22, Block 2-T, T. & N. O. R. R. Survey, thence E. along S. line of said Section 22, 988.5 ft. to a point; thence N.  $41^{\circ} 37'$  W., 531 ft. to an 8" post for a corner; thence S.  $58^{\circ} 0'$  W., 749.3 ft. to point of beginning.

7. An electric transmission line Easement 15 ft. in width in Section 22, Block 2-T, T. & N. O. R. R. Survey, being 7.5 ft. on each side of a center line described as:

Beginning at a point 200 ft. N. of SW corner of Section 22, Block 2-T, T. & N. O. R. R. Survey, thence E. 656 ft. to transformer at Well No. 3.

8. Three water pipe line easements in Section 27, Block 2-T, T. & N. O. R. R. Survey, each 20 ft. in width, the center lines of which are described as:

(a) Beginning at a point 400 ft. S. of NW corner of said Section 27, Block 2-T, T. & N. O. R. R. Survey, thence N.  $48^{\circ} 30'$  E., 603.65 ft. to the North line of said Section 27 and 452.1 ft. E. of NW corner thereof;

(b) Beginning at a point 1175 ft. E. of NW corner of said Section 27, Block 2-T, T. & N. O. R. R. Survey, thence S.  $71^{\circ} 20'$  E., 3610 ft. to Water Well No. 5;

(c) Beginning at a point 1546 ft. N. of SW Corner of Section 27, Block 2-T, T. & N. O. R. R. Survey, thence N.  $69^{\circ} 30'$  E., 1220 ft. to Water Well No. 8.

9. A double electric transmission line easement 35 ft. in width in Section 27, Block 2-T, T. & N. O. R. R.

Survey, being 17.5 ft. on each side of a center line described as:

(a) Beginning at a point 2456 ft. N. of SW corner of said Section 27, Block 2-T, T. & N. O. R. R. Survey, thence N.  $72^{\circ}$  E., 5239 ft. to transformer-station at Well No. 5;

(b) A single electric transmission line Easement 15 ft. in width in Section 27, Block 2-T, T. & N. O. R. R. Survey, being 7.5 ft. on each side of a center line described as: Beginning at a point on above described line and 870 ft. Easterly from the Westerly end thereof; thence S.  $12^{\circ}$  30' E., 670 ft. to transformer-station at Well No. 8.

10. A water well, wellhouse and transformer-station in Section 27, Block 2-T, T. & N. O. R. R. Survey, being an area within a radius 130 ft. from the center [fol. 59] of Well No. 5, said well being located 4595 ft. E., and 1155 ft. S. of NW corner of said Section 27.

11. Two hard-surfaced road Easements, each being 60 ft. in width in Section 27, Block 2-T, T. & N. O. R. R. Survey, the center lines of which are described as:

(a) Beginning at a point 1584 ft. N. of SW corner of said Section 27, Block 2-T, T. & N. O. R. R. Survey, thence N.  $69^{\circ}$  30' E., 950 ft.; thence N.  $60^{\circ}$  E., 4313 ft. to Well-Site No. 5 and

(b) Beginning at a point 970 ft. E. of NW corner of said Section 27, Block 2-T, T. & N. O. R. R. Survey, thence S.  $62^{\circ}$  E., 3340 ft. more or less to point of intersection with road easement as described above.

12. An electric transmission line and transformer-station Easement, 15 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and 730 ft. N. of SW corner of said Section 28, Block 2-T, T. & N. O. R. R.

Survey, thence No. 90 E., 2276 ft. to and including transformer-station at Well No. 2.

13. A double electric transmission line Easement 25 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and 1030 ft. N. of the SW corner of said Section 28, Block 2-T, T. & N. O. R. R. Survey, thence N. 72° E., 4658 ft. to a point in East Section line of said Section 28 and 2456 ft. N. of SE corner thereof.

14. A water pipe line and electric transmission line Easement, 35 Ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 400 ft. E. of the West Quarter corner of said Section 28, Block 2-T, T. & N. O. R. R. Survey, thence N. 2° 43' E., 2640 ft. to a point in the North Section line of said Section 28 and 525 ft. E. of NW corner thereof.

15. A hard-surfaced road Easement 60 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 891 ft. E., and 1480 ft. N. of SW corner of said Section 28, Block 2-T, T. & N. O. R. R. Survey, thence S. 74° E., 2421 ft. to Well Site No. 2, thence N. 69° 30' E., 2240 ft. to point in East Section line of Section 28 and 1584 ft. N. of SE corner thereof.

[fol. 60] 16. A hard-surfaced road easement 60 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 1510 ft. E. of NW corner of Section 28, Block 2-T, T. & N. O. R. R. Survey, thence S. 81° 39' E., 462 ft.; thence S. 7° 50' W., 713.5 ft.; thence S. 17° 57' W., 262.3 ft.; thence S. 55° 48' W., 1856.9 ft.; thence S. 42° 6' W., 252 ft. to the West line of said Section 28 and 396 ft. N. of the West Quarter Section corner.

17. An Easement covering 4.00 acres in said Section 28, Block 2-T, T. & N. O. R. R. Survey, for burning and disposal of waste material, described as:

Beginning at a point 1918 ft. E. of NW corner of Section 28, Block 2-T, T. & N. O. R. R. Survey, thence E. along said Section 400 ft. to a point; thence S. 435 ft.; thence W. 400 ft.; thence N. 435 ft. to point of beginning.

18. A water-well and water pipe line Easement, 20 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 1861 ft. E. of the SW corner of said Section 28, Block 2-T, T. & N. O. R. R. Survey, thence N. 59° 30' E., 1570 ft. to said well No. 2, thence N. 69° 30' E., 2240 ft. to a point in the East line of said Section 28, and 1546 ft. N. of the SE corner thereof.

19. A drainage ditch Easement, 20 ft. in width in said Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at Well No. 2, thence in a South-easterly direction to a point in the South line of Section 28, Block 2-T, T. & N. O. R. R. Survey, said point being 1680 ft. W. of the SE corner thereof.

20. A water pipe line Easement, 20 ft. in width in Section 28, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at point 891 ft. E. and 1030 ft. N. of SW corner of said Section 28, Block 2-T, T. & N. O. R. R. Survey, thence N. 48° 30' E., 5875 ft. to a point in the East line of said Section 28, and 400 ft. S. of NE corner thereof.

21. A water pipe line Easement 15 ft. in width in said Section 37, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and S. 0° 14' E., 571 ft. of the NW corner of said Section 37, Block 2-T,

T. & N. O. R. R. Survey, thence N. 59° 30' E., 1126 ft. to point in North line of said Section 37 and 1861 ft. E. of NW corner thereof.

[fol. 61] 22. A gas pipe line Easement, being 6 ft. in width in said Section 37, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 1392 ft. W. of the SE corner of said Section 37, Block 2-T, T. & N. O. R. R. Survey, thence N. 30° 15' W., 5950 ft. to E. line of Government property and 137 ft. S. of N. line of Section 37.

23. A drainage ditch easement, 50 ft. in width in said Section 37, Block 2-T, T. & N. O. R. R. Survey, the center line of which is described as:

Beginning at a point 1110 ft. S. of the NE corner of said Section 37; thence N. 62° W., 1640 ft.; thence in a northwesterly direction to a point on N. line of said Section 37 and 1640 ft. W. of the NE corner thereof;

for the leasehold estate therein for the tax year 1949, and for the tax year 1950, beginning January 1, 1950, through March 16, 1950.

To all of which order, ruling and decision of the Court defendant, Dumas Independent School District, in open court, objected and gave notice of appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, sitting at Amarillo.

It further appearing to the Court, and the Court being of the opinion that the law and the facts are with the defendant, Dumas Independent School District, and against the plaintiff, Phillips Chemical Company, for the tax year 1950, beginning with March 17, 1950, and for the tax years 1951, 1952, 1953 and 1954, and that the property covered by the lease between the United States as lessor and plaintiff, Phillips Chemical Company, as lessee, located in the Dumas Independent School District in Moore County, Texas, including the property above described, known and described as the Cactus Ordnance Works, is not used and occupied by the United States but is used and occupied by the plaintiff, Phillips Chemical Company, a private cor-



[fol. 62] poration in its private capacity, in the conduct of its private business and enterprise, for its profit, and was so used and occupied for such private purpose during each of the years for which the defendant, Dumas Independent School District, has sought to levy and collect taxes for the years 1949 to 1954, both inclusive, and that such property is subject to taxation by the defendant, Dumas Independent School District, of Moore County, Texas, as a political subdivision of the State of Texas, and that the same is taxable to Phillips Chemical Company for the years beginning March 17, 1950, and for the tax years of 1951, 1952, 1953, and 1954, and that the property was duly and legally assessed for taxes to Phillips Chemical Company for said years beginning March 17, 1950.

It Is Therefore Ordered, Adjudged and Decreed that all relief prayed for in this cause of action by the plaintiff, Phillips Chemical Company, for the tax year 1950 beginning with March 17, 1950, and for the tax years 1951, 1952, 1953 and 1954, be and the same is hereby in all things denied; to which order, ruling and decision of the Court the plaintiff, Phillips Chemical Company, objected and gave notice of appeal to the Court of Civil Appeals for the Seventh Supreme Judicial District, sitting at Amarillo.

It Is Further Ordered, Adjudged and Decreed that the defendant, Dumas Independent School District, do have and recover all of its costs in this behalf expended, for which let execution issue.

Done in open court this 5th day of December, A. D. 1956.

Harry H. Schultz, Judge Presiding.

Approved as to form:

L. M. Blume, Attorney for Plaintiff.

James W. Witherspoon, Attorney for Defendant.

[fol. 63]

[File endorsement omitted]

[fol. 64]

IN THE DISTRICT COURT OF MOORE COUNTY, TEXAS,  
69TH JUDICIAL DISTRICT

Cause No. 2708-A

PHILLIPS CHEMICAL COMPANY, Plaintiff,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT, Defendant.

STATEMENT OF FACTS—Filed January 21, 1957

A 6639

Filed in Supreme Court of Texas  
February 12, 1958

Geo. H. Templin, Clerk, By Jewell Seeliger, Deputy  
Joe G. Nisbett, Official and General Reporting, Box 1104,  
Dalhart, Texas

#6697

Filed in the Court of Civil Appeals for the Seventh  
Supreme Judicial District of Texas

January 31, 1957

Elmo Payne, Clerk, By .....

[File endorsement omitted]

[fol. 67]

APPEARANCES:

Mr. Rex Boyd, Amarillo, Texas, Mr. Tom Blume, Amarillo, Texas, For the Plaintiff.

Mr. Earnest L. Langley, Hereford, Texas, Mr. Wayne E. Thomas, Hereford, Texas, For the Defendant.

Be It Remembered That on the 18th day of September, 1956, the above entitled and numbered cause came on to be heard before the Honorable Harry H. Schultz, Judge

of the 69th Judicial District Court of Moore County, Texas, and the following proceedings were had:

[fol. 68]

#### STIPULATIONS

Mr. Blume: Does the defendant stipulate to the following facts: That the United States of America acquired lands described in Paragraph 4 of Plaintiff's First Amended Original Petition by condemnation proceedings in the United States District Court for the Northern District of Texas, Amarillo Division, in Case Number 259 Civil, styled United States of America versus 10,750 acres of land, et al.?

Mr. Langley: We so stipulate.

Mr. Blume: Do you further stipulate that the United States has held the fee simple title so acquired subject to the lease held by Phillips Chemical Company at all times relevant to this case, Number 2708-A?

Mr. Langley: We will so stipulate.

Mr. Blume: Will you further stipulate that the Governor of the State of Texas has never ceded to the United States an exclusive jurisdiction of the lands described in Paragraph Number 4 of Plaintiff's First Amended Original Petition as is provided for under Article 5247, Vernon's Annotated Revised Civil Statutes of Texas?

Mr. Langley: May I ask Counsel why that particular thing is of any particular relevancy?

Mr. Blume: It is relevant to show—for the same purpose [fol. 69] as the prior stipulation—to show that there is no coverage of this land under the terms of Article 5248.

Mr. Langley: If the Court, please, let the record show that the defendant objects to the admission of that on the grounds of lack of relevancy but, nevertheless, the defendant knows such stipulation to be a fact and, in the interest of time, we will stipulate that it is a fact but reserve objection to the admission of it in evidence because of a lack of relevancy.

The Court: All right.

Mr. Blume: I would like to introduce a copy of the lease and assignment under which Phillips Chemical Company

has been operating the subject plant and there is in the record, attached to certain Requests for Admissions, a photostatic copy of this lease and we would like to introduce that as our first exhibit.

Mr. Langley: The only objection we have to that, Your Honor, is that the lease, so appended to the Request for Admissions, is not a complete copy of the lease by reason of the failure to include therein certain exhibits specified in the lease contract itself. As far as we know or understand and we will stipulate it to be a fact that the base lease itself, appended to the so called Request for Ad-[fol. 70] missions filed a number of months ago, together with the assignment, are true and correct copies so far as they go but that they are lacking in completeness by reason of not having the exhibits attached thereto. We have no objection to the introduction of it in evidence except that the record should show it is not complete.

Mr. Blume: They do make reference to an Exhibit B, which is an inventory of the bolts and nuts and so forth and, as Counsel well knows, that is a sheaf of papers about a foot high.

Mr. Langley: That is correct and I am not saying it should be in evidence—the Exhibit B nor, I believe, an Exhibit C, likewise referred to—but, nevertheless, it should show that the lease is not complete because the exhibits are not in the hands of the defendant and have never been and we do not wish to be precluded in this proceeding or otherwise from showing that this lease contract does have certain inventories and other items attached to it which may become relevant, if not in the first cause of action then in the second cause of action.

Mr. Blume: But, you have no objection to such parts that are introduced?

Mr. Langley: That is right.

Mr. Blume: I take it Counsel has no objection to the [fol. 71] introduction of the assignment of such lease which is appended hereto.

Mr. Langley: That is correct.

## PLAINTIFF'S EXHIBIT NUMBER ONE

RECEIVED

JUL 29 1948

R.W.T. OFFICE

Cactus Plant

Contract no. W-41-038-Eng-6047

Phillips Petroleum Company

M-16900

## LEASE

THIS LEASE, made between the SECRETARY OF THE ARMY, of the first part, representing the United States of America (hereinafter called the Government), and PHILLIPS PETROLEUM COMPANY, a *Delaware Corporation with an operating office at Bartlesville, Oklahoma*, (hereinafter called the Lessee) of the second part, WITNESSETH:

THAT, the Secretary of the Army, by virtue of authority contained in the Act of Congress approved August 5, 1947, (Public Law 364—80th Congress), and in the Act of Congress approved July 2, 1940 (54 Stat. 712), as continued in effect by the Act of Congress approved June 5, 1942 (56 Stat. 316), and in consideration of the observance and performance by the Lessee of the covenants and conditions hereinafter set forth, hereby leases to the Lessee for the following period or periods:

a primary term of fifteen (15) years commencing on [fol. 72] August 16, 1948, and ending August 15, 1963; provided, however, that said primary term may be extended as follows:

(a) Lessee shall have and is hereby granted the right and privilege at its option to extend the term of this lease for a period of time beginning August 16, 1963, and ending August 15, 1968, upon the same terms and conditions as in this lease set forth, provided that Lessee gives notice of its election so to extend this lease for said five (5) year extension period at least six (6) months before the expiration of the fifteen (15) year primary term;

(b) If Lessee exercises its option to extend this lease for said first five (5) year extension period, Lessee shall have and is hereby granted the right and privilege at its

option to extend this lease for a second five (5) year extension period beginning August 16, 1968, and ending August 15, 1973, upon the same terms and conditions as in this lease set forth, provided that Lessee gives notice of its election so to extend this lease for said second five (5) year extension period at least six months prior to August 15, 1968:

(c) If Lessee exercises its option to extend this lease for said second five (5) year extension period, this lease [fol. 73] shall continue in full force and effect from year to year thereafter, unless and until terminated by either party by six (6) months' prior written notice given at least six months before August 15, 1973, or August 15 of any subsequent year; subject, however, to termination as hereinafter provided, the land and buildings, improvements, machinery, and appurtenances thereto belonging, as described on Exhibits A and B, attached hereto and made a part hereof, hereinafter referred to as the Leased Property, to be used for the purpose of manufacturing anhydrous ammonia or fertilizer and for other commercial and experimental purposes. The Government shall furnish, if requested by the Lessee, as a part of the Leased Property eight complete ammonia oxidation units as recognized by the trade with a total rated capacity of 440 tons nitric acid per day (calculated as 100%) and in addition, ammonium nitrate solution facilities with sufficient capacity to convert 70,000 short tons anhydrous ammonia per annum. Such equipment shall be dismantled at its present locations, moved to and re-erected on the site of the Cactus Ordnance Works at a location to be approved by the Division Engineer, Southwestern Division, by and at the expense of the Lessee. This equipment does not include equipment for supporting utilities. Notice [fol. 74] of Lessee's intention to utilize the ammonia oxidation or solution facilities herein specified in whole or in part, shall be made in writing not later than ten days after the commencement date of this lease; the Government upon receipt of said notice will promptly notify lessee of the location of said facilities. Lessee shall thereupon be required to dismantle and remove said facilities under the supervision of the Division Engineer not less



than six months after advice by the Government of the location of said facilities and to erect said facilities and place them in operating condition in accordance with plans and specifications submitted to and approved by the Division Engineer within a period of two (2) years from the date of removal of said equipment from its present location, provided however, that the Division Engineer will extend the said period of two (2) years for a period of time considered by him to be necessary in the event completion of erection and the placing in operation of said facilities is delayed or prevented by unforeseeable causes beyond the control and without the fault or negligence of the Lessee and provided further that the Lessee so advises the Division Engineer within ten (10) days from the occurrence of such event. All such facilities shall remain the property of the Government. Any equipment furnished by the Lessee to complete [fol. 75] the erection and place into operation the said facilities shall remain the property of the Lessee notwithstanding the provisions of Condition 17 of this lease.

THIS LEASE is granted subject to the following provisions and conditions:

1. That the Lessee agrees to pay the Government in monthly installments due in advance on the first day of each month rental at the rate of One Million Twenty-Six Thousand Six Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$1,026,666.67) per annum so long as this lease remains in force and effect; provided, however, that the aggregate actually expended by the Lessee in an effort to place the Leased Property in an insurable condition as specified in Condition 19, which amount shall not exceed One Million Dollars (\$1,000,000) and shall be considered prepaid rental, shall be credited on and applied against the first cash rentals becoming due and payable by the Lessee hereunder. The compensation as above reserved shall be made payable to the Treasurer of the United States and shall be forwarded by the Lessee to the Division Engineer, Southwestern Division, Dallas, Texas, or to a representative designated by him. During the period the Government purchases all or a portion of

the production of the plant as provided in Condition 6 of this lease, the rental provided above will be adjusted [fol. 76] as follows:

The rental for such period will be reduced in the same ratio as the number of tons of anhydrous ammonia purchased from Lessee by the Government or used in the manufacture of fertilizer or other products manufactured from anhydrous ammonia produced on the Leased Property and purchased by the Government under Condition 6 of this lease bears to the total anhydrous ammonia production capacity of the plant (estimated to be at the rate of 70,000 short tons per annum of anhydrous ammonia from the first train upon completion of rehabilitation of the fire damage to the said first train caused by the fire of March 6, 1948, and 70,000 short tons per annum for the second train upon completion of the said second train as provided in Condition 4 of this lease) or the total number of tons of anhydrous ammonia actually produced, whichever is greater; provided that if, for any reason beyond the control of Lessee actual production is less than the production capacity of the plant, then the rental will be reduced in the same ratio which the quantities furnished to the Government as aforesaid bear to actual production. Adjustments of rental, in the event of overpayment of rentals for any month shall be made at the commencement of the monthly rental period following such payment. The rental provided [fol. 77] herein includes compensation for use of one locomotive designated as U.S.A. No. 7313, Serial No. 15277, and one locomotive designated as U.S.A. No. 7683, Serial No. 4144. Terms and conditions governing the furnishing of said locomotives by the Government and their use by the Lessee are incorporated into an agreement ancillary to this lease, a copy of which is attached hereto, Exhibit C.

2. Except as in this lease otherwise specifically provided, all duties, responsibilities and liabilities incumbent upon the Lessee under the provisions and conditions of this lease shall attach upon the date of commencement of the lease term.

3. That at the commencement date of this lease, a survey and inventory of the Leased Property, including, but not limited to, all supplies, machinery, equipment and tools embraced therein, shall be made by a representative of the Government and a representative of the Lessee. Said survey and inventory shall be submitted to the Division Engineer for approval, and upon approval, a copy thereof shall be attached hereto as Exhibit B and become a part hereof, as fully as if originally incorporated herein. There shall be added to said survey and inventory from time to time such additional Government property, fixtures and installations as are furnished by or at the [fol. 78] expense of the Government. At the expiration or termination of this lease, a similar survey and inventory shall be prepared and submitted to the Division Engineer, said survey and inventory to constitute the basis for settlement by the Lessee with the Division Engineer for leased property shown to be lost, damaged or destroyed, and, subject to the provisions of Condition 19, any such property shall be either replaced, restored and/or settled for pursuant to the provisions of Condition 20 of this lease. Supplies included in the survey and inventory which are used by the Lessee shall be, at the election of the Government, either replaced to stores in kind or reimbursement therefor shall be made by the Lessee at the then current market value thereof upon the expiration or termination of this lease.

4. (a) That the Lessee has inspected and knows the condition of the Leased Property and that it is understood that the same is hereby leased without any representation or warranty by the Government whatsoever, and without obligation on the part of the Government to make any alterations, repairs or additions thereto, provided however that the Government will complete full restoration of damage caused by the fire which occurred on March 6, 1948, and other damages, if any, not including ordinary wear and tear, due to causes occurring subsequent thereto and prior to the date of commencement of this lease. (b) That the Lessee shall at its expense, within a period of twenty-four (24) months after the commencement date of this lease, complete and operate

that ammonia train at the plant now in an incompleated condition (hereinafter sometimes referred to as the "second ammonia train") in such manner as to double the plant's present capacity of seventy thousand (70,000) short tons per annum for the production of anhydrous ammonia, provided, however, that the Division Engineer will extend the said period of twenty-four (24) months for a period of time considered by him to be necessary in the event completion and operation of said ammonia train is delayed or prevented by unforeseeable causes beyond the control and without the fault or negligence of the Lessee and provided, further, that the Lessee so advises the Division Engineer within ten (10) days from the occurrence of such event. (c) That the Lessee may make such additional improvements to the Leased Property, at the expense of the Lessee, as are necessary to perform processing for fertilizer and/or other products.

5. That title to those improvements purchased and installed by the Lessee to complete the second ammonia train at the plant, as required in Condition 4 (b) above, shall remain in the Lessee except as otherwise provided [fol. 80] in this Condition 5. Lessee shall maintain adequate accounts in accordance with accepted accounting and business practices which will reflect the initial capital investment, for said second ammonia train and shall also reflect the amortization thereof (amortization to be computed at the maximum depreciation rates allowable by the Treasury Department, Bureau of Internal Revenue, for such capital investments). Upon complete amortization of said initial capital investment during the continuance of this lease, title to said improvements shall vest in the Government. If, however, prior to complete amortization of said capital investment for such improvements the Government terminates this lease pursuant to Condition 21 (a) or Condition 22 below, the Government will pay to the Lessee, if appropriated funds are available for such purpose, the unamortized amount of Lessee's capital investment for such improvements, title to said improvements to vest in the Government upon such payment; provided, however, that if the Government does not pay to Lessee

the unamortized amount of Lessee's capital investment for such improvements within thirty (30) days after notice of such termination of this lease by the Government, then Lessee shall have and is hereby given and granted the right and privilege at its option to remove within a period of two hundred forty (240) days from the Leased [fol. 81] Property a sufficient quantity of its improvements to equal in salvage value the unamortized amount of the Lessee's capital investment for such improvements.

6. That giving effect to the other conditions of this lease the Lessee shall operate the Leased Property and any improvements made thereto by the Lessee (including such improvements and additions as may be made by the Lessee to the Leased Property for the purpose of producing ammonia and/or end product fertilizer) in such manner as not to interrupt the flow of ammonia into the fertilizer program of the Government and continuously for the period following the commencement date of this lease and ending June 30, 1952, for the production of anhydrous ammonia and/or fertilizer, unless the Secretary of the Army (or head of any agency of the Government which may be designated to discharge the obligations of the Government for the production of fertilizer) shall during such period notify the Lessee in writing that such production is no longer required by the Government. The Lessee shall during such period furnish to the Government so much of the output of the plant, including the entire capacity thereof, as may be necessary in the discretion of the Secretary of the Army (or the head of the agency discharging the obligations of the Government for the production of fertilizer), provided, however, that nothing in [fol. 82] this Condition shall obligate the Lessee to provide anhydrous ammonia and/or fertilizer in excess of the actual production of the Leased Property and any improvements made thereto by the Lessee if for any reasons beyond the control of the Lessee the actual production is less than capacity production. All sales of anhydrous ammonia and/or fertilizer by the Lessee to the Government hereunder shall be made at the following prices or the current commercial market prices in effect at the time of delivery, whichever are lower:



- (a) The first 70,000 short tons of anhydrous ammonia per 12 month period (beginning on the commencement date of this lease and ending on the last prior date in the succeeding year) at \$26.74 per short ton f.o.b. cars to be furnished or arranged for by the Government on side tracks at the Leased Property near Etter, Texas.
- (b) Additional anhydrous ammonia (all above the first 70,000 short tons per 12-month period) at \$37.26 per short ton f.o.b. cars to be furnished or arranged for by the Government on side tracks at the Leased Property near Etter, Texas.
- (c) Ammonium sulphate, fertilizer grade with 21% by weight minimum nitrogen content, up to a maximum of 266,000 short tons per 12-month period, at \$39.66 [fol. 83] per short ton in bulk f.a.s. any port on the Gulf Coast designated by the Lessee with the Lessee providing a sufficient quantity of four-ply bags to accompany the ammonium sulphate to permit it to be bagged at destination; provided, however, that ammonium sulphate, fertilizer grade, with 20.5% by weight minimum nitrogen content may be so delivered hereunder at the option of the Lessee, and if any such ammonium sulphate, fertilizer grade, with nitrogen content from 20.5% to 21% by weight is so delivered hereunder, said price of \$39.66 per short ton shall be reduced \$0.28 per short ton for each 0.1% by weight by which the nitrogen content of such ammonium sulphate is less than 21% by weight.
- (d) Ammonium nitrate, fertilizer grade, with 33.2% by weight minimum nitrogen content, in lieu of the first 70,000 short tons of anhydrous ammonia equivalent to 155,500 short tons of such ammonium nitrate or any part thereof per 12-month period, at \$46.54 per short ton in export type bags f.o.b. cars at the Lessee's ammonium nitrate plant near Etter, Texas.
- (e) Ammonium nitrate, fertilizer grade, with 33.2% by [fol. 84] weight minimum nitrogen content, in lieu



of the anhydrous ammonia produced in excess of the first 70,000 short tons per 12-month period equivalent to 155,500 short tons of such ammonium nitrate or any part thereof per 12-month period, at \$37.66 per short ton in export type bags f.o.b. cars at the Lessee's ammonium nitrate plant near Etter, Texas.

Delivery of anhydrous ammonia and/or end product fertilizer shall be in accordance with the terms and conditions more specifically set forth in supply contracts entered into from time to time by the Government (represented by the Chief of Ordnance) with the Lessee. These contracts as they are entered into from year to year will contain conditions and price provisions substantially the same as those appearing on forms of Supply Contracts attached hereto and marked Exhibits D, E and F. All prices specified in this Condition 6 are subject to adjustment to compensate for changes in the cost of labor and material and for changes in freight rates, if applicable. The price of natural gas for the purpose of escalation has been fixed by agreement between the Government and the Lessee at 3.45 cents per thousand cubic feet for the period August 16, 1948 through September 30, 1948, and at 6.667 cents per thousand cubic feet for the [fol. 85] period October 1, 1948 through June 30, 1952, said gas to be measured at 13.7 pounds per square inch absolute and 60 degrees Fahrenheit.

It is understood and agreed by and between the Government and the Lessee that if the Lessee provides facilities for the production of end product ammonium nitrate, fertilizer grade, and/or ammonium sulphate, fertilizer grade, the Lessee may at any time and from time to time in the absence of a national emergency declared by the President or the Congress of the United States, at Lessee's election after three months' notice in writing to the Government, furnish to the Government, except during periods of national emergency declared by the President or the Congress of the United States at which times such election shall be inoperative, and the Government will purchase at the prices and during the period

stated in this Condition 6 ammonium sulphate, fertilizer grade, and/or ammonium nitrate, fertilizer grade, in lieu of and equivalent to anhydrous ammonia to be furnished and delivered to the Government pursuant to supply contracts entered into between the Government and the Lessee:

1. Ammonium sulphate, fertilizer grade, with 20.5% by weight minimum nitrogen content, up to a maximum of 266,000 short tons per 12-month period and or [fol. 86]
2. Ammonium nitrate, fertilizer grade, with 33.2% by weight minimum nitrogen content, not in excess of the equivalent of anhydrous ammonia or that portion of anhydrous ammonia, if any, not utilized in the processing of ammonium sulphate, fertilizer grade.

The following method will be used for price calculations during any period in which ammonium nitrate, fertilizer grade, and/or ammonium sulphate, fertilizer grade, in lieu of any portion or all of the anhydrous ammonia production of the Leased Property, is being furnished and delivered to the Government:

Anhydrous ammonia furnished and delivered up to 70,000 short tons per 12-month period will be considered as having been furnished and delivered from the first 70,000 short tons of anhydrous ammonia produced on the Leased Property, notwithstanding that ammonium sulphate, fertilizer grade, and/or ammonium nitrate, fertilizer grade, are furnished and delivered during the same period. Ammonium nitrate, fertilizer grade, will be considered as having been furnished from anhydrous ammonia produced at the plant in excess of anhydrous ammonia furnished and delivered to the Government in the form of anhydrous [fol. 87] ammonia and/or the equivalent in ammonium sulphate, fertilizer grade, during the same period.

7. (a) That if, at any time during the term of this lease or any extension thereof, a national emergency is declared by the President or the Congress of the United States and the Secretary of the Army determines that it is necessary to utilize the productive capacity of the plant

for manufacture of anhydrous ammonia and or other products required for the national defense the Government will undertake to negotiate a satisfactory contract with the Lessee for the furnishing of such products up to the maximum capacity of the plant, provided, however, that nothing in this Condition shall obligate the Lessee to provide such products in excess of actual production of the Leased Property and any improvements made thereto by the Lessee if for any reason beyond the control of the Lessee the actual production is less than capacity production. In the event a mutually satisfactory contract cannot be negotiated with the Lessee within a period of thirty days, the Government may terminate the lease in accordance with Condition 21 (a):

(b) That if, after receipt by the Lessee of the notice provided for in Condition 6 of this lease, or June 30, 1952, whichever occurs first, and in the absence of a [fol. 88] national emergency declared by the President or the Congress of the United States, the Secretary of the Army determines that it is necessary to utilize the productive capacity of the plant, the Government shall have and is hereby granted the right, upon one year's notice is writing to the Lessee to acquire all or a portion of the production of the Leased Property and any improvements made thereto by the Lessee in the form of anhydrous ammonia or other products at prices mutually satisfactory and not exceeding the then current market prices for similar products, or at the then current market prices for similar products.

8. That the Lessee shall maintain an adequate property control and accounting system consistent with generally accepted accounting and business practices to establish the costs of capital improvements, the costs of placing the Leased Property in an insurable condition as provided in Condition 19, and those elements of the costs of production of the anhydrous ammonia and/or the fertilizer end product which are necessary to establish price changes in accordance with the escalation provisions of Condition 6 hereof and the escalation provisions of the Supply Contracts ancillary hereto, and quantities pro-

duced. Such records and accounts will be made available at all reasonable times upon request of the Secretary of [fol. 89] the Army (or the head of agency discharging the obligations of the Government for production of fertilizer).

9. That the Lessee shall assume operation of all utility and service facilities existing at the installation and arrange for such additional utilities or services as may be required in the operation of the plant. The Lessee shall keep in force and effect during the term of this lease legally binding rights to supplies of gas sufficient to operate the Leased Property and improvements made thereto by the Lessee at full capacity for production of ammonia.

10. That the Lessee shall make available to the Government information concerning any technological discoveries and/or improvements in the field of nitrogen fertilizer made in the course of and resulting from operation of the Leased Property or any addition or improvements made thereto by the Lessee, and shall grant to the Government a non-exclusive, royalty free license under any patents of the Lessee covering such technological discoveries and/or improvements with the right in the Government to sublicense any lessee, vendee or transferee of a Government-owned plant utilizing the processes for the manufacture of anhydrous ammonia and/or nitrogen fertilizer, such sublicense to be limited, [fol. 90] nowever, to the operation of such plant..

11. That the Lessee shall neither transfer nor assign this lease; nor sublet the Leased Property or any part thereof; nor grant any interest, privilege or license whatsoever in connection therewith without permission in writing from the Division Engineer; provided, however, that with written notice to the Division Engineer the Lessee shall have the right without such permission to assign its right hereunder to the Phillips Chemical Company, such assignment to be effective for so long as said company remains a wholly owned subsidiary of the Lessee, in which event the liability of the Lessee for performance of the terms and conditions of this lease shall remain

unimpaired by such assignment; provided, further, that this paragraph shall not prohibit the Lessee, for its own account or under any such other arrangements as it may deem desirable from dispensing and selling food, groceries, meats, soft drinks, tobacco products, confectionery, other articles and requisite services to the employees and visitors of the Lessee on the Leased Property, and to nonemployees occupying facilities in the housing area; and provided, further, that this paragraph shall not prohibit the Lessee, incident to its administration of the housing area known as Cactus Courts from subleasing [fol. 91] facilities therein situated. The Lessee shall not without legal cause evict tenants who are veterans of World War II occupying facilities in said area at the commencement date of this lease.

12. That the Government for itself and its designees reserves the right at any time to enter the Leased Property for the purpose of inspection, inventory, the disposition of materials other than Leased Property, and when otherwise deemed necessary for the protection of the interests of the Government.

13. That the Government shall not be responsible for damages to the property of the Lessee nor for damages to the property or injuries to the person of the Lessee's officers, agents, servants or employees or other persons on the Leased Property as invitees or licensees of the Lessee arising from the use of the Leased Property by the Lessee, and the Lessee shall indemnify and save the Government harmless from any and all such claims. The Government shall not be responsible for damages to any persons or property off the Leased Property, including but not limited to damages incident to the discharge of waste or effluent from the Leased Property in such a manner that such discharge contaminates streams or other bodies of water or otherwise becomes a public nuisance, arising from the Lessee's use of the Leased Property and [fol. 92] the Lessee shall indemnify and save the Government harmless from any and all claims for such damages.

14. That the Government agrees to grant and hereby grants to Lessee a royalty free, revocable, non-transferrable



and non-exclusive license to use in the plant all patent rights that the Government may have the right to license or sub-license covering the process or apparatus used in the plant, including additions to or enlargements thereof. The Government further agrees not to revoke the license granted herein unless the lease is otherwise terminated in accordance with its provisions. That the Lessee agrees to indemnify the Government, its officers, agents, servants and employees against liability, including costs and expenses for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be ordered to be kept secret under the provisions of the act of October 6, 1917, as amended; 35 U.S.C. 42) occurring in the performance of this contract; provided, however, that the above indemnity shall not apply to such infringement arising out of operation of the two ammonia trains now situated in the plant where the operation thereof is in behalf of the Government; this proviso is however, subject to the condition that such ammonia trains are operated by the Lessee to utilize the same process or [fol. 93] processes as heretofore practiced in such trains.

15. That, subject to the provisions of Condition 19, all portions of the Leased Property being used by the Lessee shall at all times be maintained in good operating condition by and at the expense of the Lessee and said portions of the Leased Property shall be kept in as good order and condition as that existing upon the date possession of the Leased Property was delivered to the Lessee, ordinary wear and tear excepted, by and at the expense of the Lessee. Installed and other equipment of the Government used by the Lessee which becomes worn or damaged by use so as no longer to function for the purpose for which designed shall be replaced by the Lessee by like items at the expense of the Lessee, and title to such replacements shall vest in the Government at the time of replacement, provided, however, that in the event such equipment has become obsolete, it may with the prior written consent of the Division Engineer be replaced by the Lessee with substitute equipment approved by the Division Engineer, in which event the inventory provided



for in Condition 3 of this lease will be appropriately modified, title to such substitute equipment to vest in the Government at the time of replacement and title to the replaced equipment to vest in the Lessee at such time.

[fol. 94] 16. That, subject to the provisions of Condition 19, all portions of the Leased Property not being used by the Lessee shall be maintained in standby condition, by and at the expense of the Lessee, in accordance with established industrial standards.

17. That no structures, additions or betterments, temporary or permanent, shall be placed upon the Leased Property without the prior written approval of the Division Engineer nor shall any property which is now or may ultimately become the property of the Government be removed without such approval. All such structures, additions and betterments to the Leased Property shall become the property of the Government when annexed unless otherwise provided by separate agreement between the Division Engineer and the Lessee, or by the terms of Condition 5 of this lease. The Lessee shall make no structural alteration of the Leased Property which will render the Leased Property unsuitable for restoration within a period of one hundred twenty (120) days to the purpose for which originally designed. Installed and other equipment may be altered, replaced or improved without the prior written approval of the Division Engineer, provided that such alterations, replacements or improvements will not prevent the return of the Leased Property to [fol. 95] the condition existing at the time of entry by the Lessee under this lease within a period of one hundred and twenty (120) days, and provided, further, that all such alterations, replacements or improvements shall become the property of the Government when made. The Lessee shall prepare and maintain adequate drawings showing the location and connections and other installation data of each item, or part thereof, reconnected or removed from its installed location, and the Lessee shall tag, for identification purposes, each principal item or part thereof, so removed, to insure a minimum of time and expense in restoration.

18. That if, during the term of this lease, the Leased Property or a substantial part thereof, is destroyed or rendered unfit for occupancy or for the purpose for which it was leased without fault, negligence, bad faith or willful misconduct of any officer or director of Lessee or representative of Lessee having supervision of the Leased Property as a whole, acting within the scope of his authority and employment, the obligation of the Lessee to pay rental shall be reduced in proper proportion until such part of the Leased Property shall have been repaired and restored to fitness for occupancy and for the purpose for which it was leased. In such event or in the event of termination of this lease pursuant to the [fol. 96] provisions of Condition 21(a), prepaid rental shall be appropriately refunded.

19. Upon taking possession of the Leased Property pursuant to the provisions and conditions of this lease, the Lessee shall use its best efforts to procure and thereafter maintain at its cost a standard fire and extended coverage insurance policy or policies on the Leased Property to the full insurable value thereof. If the Lessee is unable to procure such insurance on all or any part of the Leased Property because of the condition thereof, the Lessee shall endeavor to place the Leased Property in an insurable condition within a reasonable time, which, it is agreed, shall be a period not exceeding one (1) year. All cost in connection therewith shall be borne by the Lessee; provided, however, that title to materials and equipment removed from the Leased Property by the Lessee (with the approval of the Division Engineer as provided in Condition 17) in a bona fide effort to place said property in an insurable condition shall be vested in the Lessee and funds derived from the sale thereof, of funds equal to the salvage value thereof if said materials and equipment shall be retained by Lessee (to be determined by mutual agreement between Lessee and the Division Engineer), shall be expended by Lessee in furtherance of the effort to place said property in an insurable condition. In addition to said funds, the Lessee shall expend a maximum of One Million Dollars (\$1,000,000), if necessary, in an effort to place the Leased

Property in an insurable condition, provided that the plans and specifications and estimated costs shall be agreed upon by the Lessee and the Division Engineer.

During the period required for placing the Leased Property in an insurable condition or in the event the Leased Property cannot be placed in an insurable condition by the aforesaid expenditures or during any period in which the Lessee is unable to procure and/or maintain insurance coverage at the rates hereinafter mentioned, the Lessee shall not be liable for any damage to or destruction of that portion of the Leased Property which is not fully insured provided that such damage or destruction is without the fault, negligence, bad faith or willful misconduct of any officer or director of Lessee or representative of Lessee having supervision of the Leased Property as a whole, acting within the scope of his authority and employment, and results from any of the following causes:

Fire; lightning, windstorm, cyclone, tornado, hail and other acts of God; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles [fol. 98] running on land or tracks, excluding vehicles owned or operated by the Lessee or any agent or employee of the Lessee; smoke, sprinkler leakage; earthquake or volcanic eruption; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack.

The Lessee shall endeavor to procure the aforesaid fire and extended coverage insurance from any responsible insurer or insurers qualified to do business in the United States of America which will issue such insurance on the Leased Property in compliance with the rates established by the Texas Rating Bureau. The policy or policies evidencing such insurance shall provide that in the event of loss thereunder the proceeds of the policy or policies shall be payable to the Lessee to be used solely for the repair, restoration, or replacement of the property dam-

aged or destroyed, any balance of the proceeds not required or used by the Lessee for the repair, restoration, or replacement of the property damaged or destroyed to be paid to the Government; provided, however, that the insurer, after payment of any proceeds to the Lessee in accordance with the provisions of the policy or policies, shall have no obligation or liability with respect to the use or disposition of the proceeds by the Lessee.

[fol. 99] If, during the term hereof, while the Lessee in maintaining insurance coverage thereon as hereinbefore provided and under circumstances relieving the Lessee of any liability therefor, the Leased Property shall be damaged to such an extent as to become inoperative, and if the Leased Property can be repaired, restored or replaced only through the expenditure of funds substantially in excess of those paid under insurance policies and if the Government does not elect to supplement said sums paid under insurance policies to an extent sufficient to repair, restore, or replace, at the Government's expense, the Leased Property, then and in those events Lessee shall have the option of making such repairs and replacements at its own expense or of terminating this lease, at any time within one hundred twenty (120) days following such damage or destruction, by giving the Government ninety (90) days notice in writing of Lessee's desire and intention so to do, in which last mentioned event all sums payable under said insurance policy or policies as a result of such damage shall be payable to the Government.

If, during the term hereof and while no insurance is in force and effect covering the Leased Property, said Property shall be damaged under circumstances relieving the Lessee of any liability therefor and the Government does [fol. 100] not elect to repair or restore said Property, then in such event Lessee, if it so desires, may cancel this lease, at any time within one hundred twenty (120) days following such damage or destruction, by giving the Government ninety (90) days notice in writing of Lessee's desire and intention so to do.

Except to the extent it is relieved of the obligation so to do by the foregoing provisions of this Condition 19,

the Lessee shall repair, restore and replace Leased Property as elsewhere provided in this lease. Nothing contained in this lease shall be construed as an obligation upon the Government to repair, restore and replace the Leased Property, or any part thereof.

20. That upon the expiration or revocation of this lease, the Lessee shall, if required by the Government, (a) within the shortest possible time, but in no case in excess of 120 days from the date of expiration of this lease or 240 days from the date written notice of revocation of this lease is received, remove such of its property as has not become the property of the Government under the terms of this lease, except as in this lease otherwise specifically provided, and within the shortest possible time, but in no case in excess of 120 days from the date written notice of revocation is received, or from the date of [fol. 101] expiration, subject to the provisions of Condition 19, restore the Leased Property (except land areas occupied by property of the Lessee to be removed during the 240 day period provided above, which land areas will be restored as herein provided during said 240 day period) to as good order and condition as that existing upon the date of commencement of the term of this lease, less ordinary wear and tear, and place the Leased Property in "standby condition for extended storage," according to established industrial standards, the cost of so restoring the Leased Property and so placing the Leased Property in standby condition for extended storage to be borne by the Lessee, or (b) remove such of its property as has not become the property of the Government under the terms of this lease except as in this lease otherwise provided, and within the shortest possible time place the Leased Property in an operating condition suitable for the Government's production purposes, provided, however, in the event the cost of placing the Leased Property in said operating condition is in excess of the estimated cost of restoring the Leased Property and placing it in 'standby condition for extended storage' as required by Condition 20 (a) of this lease the Government shall pay the Lessee the amount of the difference in said costs, and in the event the cost of placing the Leased Property in said operating



condition is less than the estimated cost of restoring the [fol. 102] Leased Property and placing it in standby condition for extended storage as required by Condition 20 (a) of this lease, the Lessee shall pay the Government the amount of the difference between said costs, or (c) remove such of its property as has not become the property of the Government under the terms of this lease, except as in this lease otherwise provided, and return the Leased Property to the Government in an "as is" condition, the Lessee to pay the Government the amount of the estimated cost of restoring the Leased Property and placing it in "standby condition for extended storage" as required by Condition 20 (a) of this lease. In the event the Government elects upon expiration or other termination of this lease to have the Leased Property restored and placed in standby condition for extended storage as required by Condition 20 (a), or placed in an operating condition as required by Condition 20 (b), the Lessee shall upon the completion of the work required thereby, immediately and peaceably yield the same to the Government in said condition. If the Lessee shall fail or neglect to remove its property, or to restore the Leased Property or to place the Leased Property in standby condition for extended storage, or to yield the Leased Property, as herein provided, then the Government may cause the property of the Lessee to be removed, and [fol. 103] the Leased Property to be restored and conditioned, and the cost of such removal, restoration and conditioning shall be paid by the Lessee to the Government upon demand, and no claim for damages against the Government or its officers or agents shall be created by or made on account of such removal, restoration and conditioning. In aid of its obligation so to return the Leased Property, the Lessee shall maintain a program for the proper use, protection, care and maintenance of the Leased Property, as well as a property control and accounting system consistent with good business practice. The Lessee shall exercise due diligence to protect the Leased Property against damage or destruction by fire, sabotage and other causes, but the liability of the Lessee for loss thereof or damage thereto shall be as provided in the other terms and conditions of this lease.



21. That the Government may terminate this lease at any time by giving thirty (30) days' written notice by the Division Engineer to the Lessee (a) in the event there is a declaration of national emergency by the President or the Congress of the United States, or (b) in the event the Lessee violates any of the terms and conditions of this lease and continues and persists therein for fifteen (15) days after notice thereof in writing by the Division Engineer.

[fol. 104] 22. That the Government shall have the right to revoke this lease in order to permit the sale of the Leased Property; provided, however, that Lessee shall be given at least ninety (90) days prior written notice of such proposed revocation for such purpose shall not become effective until the date of the actual consummation of such sale of the Leased Property by formal transfer of title thereto to the purchaser. Lessee shall have and is hereby granted the right of first refusal to purchase the Leased Property in the event of such revocation at the best bona fide price and terms and conditions offered to and acceptable to the Government by a prospective purchaser ready, able and willing to purchase such Leased Property; and the Government shall, before making any sale or agreement to sell such Leased Property to any other person than Lessee, give notice to Lessee of the price and other terms and conditions offered by such prospective purchaser, and for a period of thirty (30) days after the date of receipt by Lessee of such notice, Lessee shall have the right to give notice to the Government that Lessee desires to purchase such Leased Property at the price and upon the terms and conditions so offered by such prospective purchaser. If Lessee shall give such notice within such thirty-day period, the Government shall execute and deliver unto [fol. 105] Lessee appropriate instruments of conveyance necessary to vest title to the Leased Property in Lessee upon payment by Lessee of the amount of the purchase price. If Lessee shall not so elect to purchase such Leased Property, the Government shall be free to sell the same at the price and on the terms and conditions specified in such notice to Lessee, but if such sale is not consummated at such price and on such terms and conditions within six (6)

months after such notice to Lessee of the price and other terms and conditions offered by the prospective purchaser, then no subsequent sale of the Leased Property shall be made unless and until the Government shall have again complied with all provisions of this Condition 22 on the part of the Government to be done and performed and the Lessee shall again have the same rights and privileges as hereinabove in this Condition 22 set forth. The provisions of this Condition 22 shall be and remain in effect at all times so long as this lease shall be and remain in effect, whether during the primary term of this lease or any extension or renewal thereof.

23. That prior to the commencement date of this lease, the Lessee shall procure and maintain at its own cost a performance bond, in the penal sum of four million dollars (\$4,000,000) plus an amount equal to the first two years' [fol. 106] rental provided in Condition No. 1 of this lease in such form as is approved by the Division Engineer, executed by acceptable surety or sureties. Such bond shall provide that the Lessee shall expend a sum sufficient to provide for completion of the second ammonia train required under Condition 4 of this lease or four million dollars (\$4,000,000) whichever is less; and that the Lessee shall pay the first two years' rental hereunder as provided in Condition 1 of this lease.

24. (a) That all uranium, thorium, and all other materials determined pursuant to section 5 (b) (1) of the Atomic Energy Act of 1946 (60 Stat. 761) to be peculiarly essential to the production of fissionable material, contained, in whatever concentration, in deposits in the lands covered by this instrument are hereby reserved for the use of the United States, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same, making just compensation for any damage or injury occasioned thereby. However, such land may be used, and any rights otherwise acquired by this disposition may be exercised, as if no reservation of such materials had been made; except that, when such use results in the extraction of any such material from the land

in quantities which may not be transferred or delivered [fol. 107] without a license under the Atomic Energy Act of 1946, as it now exists or may hereafter be amended, such material shall be the property of the United States Atomic Energy Commission, and the Commission may require delivery of such material to it by any possessor thereof after such material has been separated as such from the ores in which it was contained. If the Commission requires the delivery of such material to it, it shall pay to the person mining or extracting the same, or to such other person as the Commission determines to be entitled thereto, such sums, including profits, as the Commission deems fair and reasonable for the discovery, mining, development, production, extraction, and other services performed with respect to such material prior to such delivery, but such payment shall not include any amount on account of the value of such material before removal from its place of deposit in nature. If the Commission does not require delivery of such material to it, the reservation hereby made shall be of no further force or effect.

(b) That nothing herein contained shall be construed to authorize the Lessee to explore, develop or operate the Leased Property for the production or extraction of oil, gas, or any other minerals except water, and the Government hereby reserves the right to enter upon the Leased [fol. 108] Property for the purpose of producing and extracting oil, gas and other minerals, provided, however, that said right shall be exercised in such a manner as not to interfere with the rights of the Lessee hereunder.

25. That, except as otherwise specifically provided in this lease, all disputes concerning questions of fact which may arise under this lease, and which are not disposed of by mutual agreement, shall be decided by the Division Engineer, who shall reduce his decision to writing and mail a copy thereof to the Lessee at its address shown herein. Within thirty (30) days from said mailing the Lessee may appeal in writing to the Secretary of the Army, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of the Army may, in his discretion, designate an individual, or individuals, other

than the Division Engineer, or a board as his authorized representative to determine appeals under this condition. The Lessee shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The President of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the [fol. 109] transaction of the business of the board or of a division, respectively and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within thirty (30) days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision the president will promptly submit the appeal to the Assistant Secretary of the Army for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose may hold hearings, examine witnesses, receive evidence and report the evidence to the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the Lessee shall diligently proceed with the performance of this lease.

[fol. 110] 26. That no member of or delegate to Congress or Resident Commission shall be admitted to any share or part of this lease or to any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the lease be for the general benefit of such corporation.

27. That the Lessee warrants that it has not employed any person to solicit or secure this lease upon any agree-

ment for commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to annul this lease, or, in its option, to collect from the Lessee the amount of such commission, percentage, brokerage, or contingent fee, in addition to the consideration herein set forth. This warranty shall not apply to commissions payable by the Lessee upon contracts or leases secured or made through bona fide established commercial or selling agencies maintained by the Lessee for the purpose of securing this lease.

28. That all notices to be given pursuant to this lease shall be addressed, if to the Lessee, to *Phillips Petroleum Company, Bartlesville, Oklahoma*, if to the Government, to the Division Engineer, Southwestern Division, Dallas, Texas, or as may from time to time otherwise be directed by the parties. Notice shall be deemed to have been duly given if and when inclosed in a properly sealed envelope [fol. 111] or wrapper, addressed as aforesaid, marked as registered mail, with registry fee prepaid and deposited under its franking privilege) in a post office or branch post office regularly maintained by the United States Government.

29. That the Lessee shall pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed, or imposed upon the Government or upon the Lessee with respect to or upon the Leased Property. In the event any taxes, assessments, or similar charges are imposed with the consent of the Congress upon property owned by the Government and included in this lease (as opposed to the leasehold interest of the Lessee therein), this Lease shall be renegotiated so as to accomplish an equitable reduction in the rental provided above, which shall not be greater than the difference between the amount of such taxes, assessments, or similar charges and the amount of any taxes, assessments, or similar charges which were imposed upon such Lessee with respect to its leasehold interest in the premises prior to the granting of such consent by the Congress; provided, that, in the event that the



parties hereto are unable to agree, within ninety (90) days [fol. 112] from the date of the imposition of such taxes, assessments, or similar charges, on a rental which, in the opinion of the Division Engineer, constitutes a reasonable return to the Government on the Leased Property, then, in such event, the Division Engineer shall have the right to determine the amount of the rental, which determination shall be binding on the Lessee subject to appeal in accordance with Condition 25 of this lease.

30. That the Lessee shall furnish office facilities without charge and living quarters, if available, at the prevailing rates charged others for similar accommodations, to such Government representatives as may be required to be on the Leased Property from time to time for the purpose of administering the terms and conditions of this lease.

31. That, except as otherwise specifically provided herein, the term "Division Engineer" as used herein shall include his duly appointed successors and his authorized representatives.

IN WITNESS WHEREOF I have hereunto set my hand by authority of the Secretary of the Army this 22nd day of July 1948.

(s) R. C. CRAWFORD

R. C. Crawford

Major General

[fol. 113]

Acting Chief of Engineers

THIS LEASE is also executed by the Lessee this 23rd day of July 1948.

PHILLIPS PETROLEUM COMPANY

(s) R. C. JOPLING (SEAL)

Title Vice President

Bartlesville, Oklahoma

(Post Office Address)

Signed and Sealed  
in the presence of:

(s) C. A. WHITFIELD

(s) LAWSON B. KNOTT, JR.



## C E R T I F I C A T E

I, T. S. Gay, certify that I am the Assistant-Secretary of the corporation named as Lessee herein; that R. C. Jopling, who signed this lease on behalf of the Lessee, was then Vice-President of said corporation; that said lease was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

(s) T. S. GAY

(CORPORATE SEAL)

### CACTUS ORDNANCE WORKS DESCRIPTION OF FEE-OWNED LANDS

That part of Sections 20, 28, 29, 36, 37 and 38, Block 2-T, T. & N. O. RR Survey, Moore County, Texas, being 1538.31 acres, more or less, described in 7 tracts as follows:

[fol. 114] 1. Acquisition Tract 18: All that part of Section 20, Blk. 2-T, T. & N. O. RR Survey, Moore County, Texas, lying East of U. S. Highway No. 287 and South of the County line between Moore and Sherman Counties, containing 105.87 acres, more or less.

2. Part of Acquisition Tract 12: The W. 891 ft. of the SW  $\frac{1}{4}$  of Section 28, Blk. 2-T, T. & N. O. RR Survey, containing 54.00 acres, more or less.

3. Part of Acquisition Tract No. 10: All that part of Section 29, Blk. 2-T, T. & N. O. RR Survey, lying East of U. S. Highway No. 287, containing 451.18 acres, more or less.

4. 222.07 acres of Acquisition Tract No. 1, being all that part of Section 36, Blk. 2-T, T. & N. O. RR Survey, lying East of Texas State Highway No. 9 (same as U. S. Highway No. 287), except 0.38 acres, described as:

Beginning at a point in the East R.O.W. line of State Highway No. 9, said point being 2507 ft. N. of its intersection with the South line of Section 36; thence N. 89° 41' E., 550 ft; thence N. 0° 19' E., 30 ft; thence

S. 89° 41' W., 550 ft. to a point in the East R.O.W. line of said Highway No. 9; thence S. 0° 19' W., a distance of 30 ft along the East R.O.W. line of Highway No. 9 to the point of beginning.

[fol. 115] And also except 1.78 acres of land for site occupied by Laundry Building described as:

Beginning at a point S. 62° 30' W., 1602.4 ft. and S. 47° E., 239.2 ft. of the NE corner of said Section 36; thence S. 47° 42' E., 595 ft; thence S. 42° 18' W., 130.4 ft; thence N. 47° 42' W., 595.5 ft. thence N. 47° 34' E., 130.4 ft to point of beginning.

5. Part of Acquisition Tract No. 2, containing four parcels of land described as:

(a) Beginning at a point 106 ft. N. of SE corner of Section 37, Blk. 2-T, T. & N. O. RR Survey, thence N. along the East line of said Section 37; thence S. 89° 42' W., 1205 ft; thence S. 0° 11' E., 848 ft; thence N. 89° 42' E., 1205 ft; to point of beginning, containing 23.50 acres, more or less.

(b) Beginning at the NW corner of Section 37, Blk. 2-T, T. & N. O. RR survey, thence S. 0° 14' E., 1466.66 ft. along the W. line of said Section 37; thence N. 89° 46' E., 891 ft; thence N. 0° 14' W., 1466.66 ft to N. line of said Section 37; thence W. 891 ft along the N. line of said Section 37 to point of beginning, containing 30.00 acres, more or less.

[fol. 116] (c) A tract of land in Section 37, Blk. 2-T, T. & N. O. RR Survey, 150 ft. in width being 75 ft. on each side of a center line described as: Beginning at a point 891 ft. E. and S., 0° 14' E., 1466.66 ft from the NW corner of Section 37, thence S. 38° E., 2390 ft; thence N. 83° E., 360 ft; thence S. 47° E., 1950 ft. to a point, said point being 1165 ft. W. and 954 ft. N. of the SE corner of said Section 37, and containing 15.90 acres, more or less.

(d) Beginning at a 1" iron pipe in the West line of Section 37, Blk. 2-T, R. & N. O. RR Survey, said point

being 105 ft. N. of the SW corner of said Section; thence N. along said Section line 384 ft to a point in the Section line marked by 1" iron pipe; thence S. 44° 20' E., 538.9 ft. to a point in property line fence marked with 1" iron pipe; thence in a Westerly direction 378.1 ft. to point of beginning, and containing 1.66 acres, more or less.

6. Acquisition Tract No. 3: The NW $\frac{1}{4}$  and the S $\frac{1}{2}$  of Section 38, Blk. 2-T, T. & N. O. RR Survey, except 6.60 acres in the SE corner of the S $\frac{1}{2}$  of Section 38, lying E. of County Road conveyed to C.R.I.&G. RR Co., by instrument recorded in Vol. 46 at page 59, Deed Records of [fol. 117] Moore County, Texas, and containing 473.40 acres, more or less.

7. Acquisition Tract No. 4: The NE $\frac{1}{4}$  of Section 38, Blk. 2-T, T. & N. O. RR Survey, containing 160.00 acres, more or less.

### DESCRIPTION OF EASEMENT AREAS

That part of Sections 20, 21, 27, 28 and 37, Blk. 2-T, T. & N. O. RR Survey, Sherman and Moore Counties, Texas, being 56.00 acres, more or less, described in 23 Tracts as follows:

1. A water pipeline, double electric transmission line and hard-surfaced road Easement 105 ft. in width in Section 20, Blk. 2-T, T. & N. O. RR Survey, being 52.5 ft. on each side of a center line described as:

Beginning at a point 1210 ft. N. of the SE corner of said Section 20, Blk. 2-T, T. & N. O. RR Survey, thence N. 30° W., 4267 ft. to a point 50 ft. past Water Well No. 6.

2. A water pipeline, double electric transmission line and hard-surfaced road Easement 105 ft. in width in Section 21, Blk. 2-T, T. & N. O. RR Survey, being 52.5 ft. on each side of a center line described as:

Beginning at a point 560 ft. E. of the SW corner of said Section 21, Blk. 2-T, T. & N. O. RR Survey, thence

N. 263 ft. to a point; thence N. 30° W., 1123 ft. to [fol. 118] the West line of said Section 21, and 1210 ft. N. of SW corner thereof.

3. An electric transmission line Easement 15 ft. in width in Section 21, Blk. 2-T, T. & N. O. RR Survey, being 7.5 ft. on each side of a center line, described as:

Beginning at a point 200 ft. N. of the SE corner of said Section 21, Blk. 2-T, T. & N. O. RR Survey, thence in a Westerly direction 4793 ft. to intersection with a double electric transmission line, at a point 256 ft. N. and 510 ft. E. of SW corner of said Section 21.

4. A water well, wellhouse and transformer-station Easement in Section 21, Blk. 2-T, T. & N. O. RR Survey, said Easement covering an area within a radius of 150 ft. from the center of existing Water Well No. 4, which is N. 49° E., 700 ft. from the SW corner of said Section 21.

5. A hard-surfaced road Easement 60 ft. in width, being 30 ft. on each side of a center line described as:

Beginning at a point 91 ft. N. of SW corner of said Section 21, Blk. 2-T, T. & N. O. RR survey, thence N. 86° 33' 45" E., 614.8 ft.; thence S. 81° 39' E., 822 ft. to the South line of said Section 21, and 1510 ft. E. of the SW corner thereof.

6. A water well, wellhouse and transformer-station [fol. 119] Easement for Well No. 3, in Section 22, Blk. 2-T, T. & N. O. RR Survey, described as:

Beginning at a point 250 ft. E. of SW corner of said Section 22, Blk. 2-T, T. & N. O. RR Survey, thence E. along S. line of said Section 22, 988.5 ft. to a point; thence N. 41° 37' W., 531 ft. to an 8" post for a corner; thence S. 58° 0' W., 749.3 ft. to point of beginning.

7. An electric transmission line Easement 15 ft. in width in Section 22, Blk. 2-T, T. & N. O. RR Survey, being 7.5 ft. on each side of a center line described as:

Beginning at a point 200 ft. N. of SW corner of Section 22, Blk. 2-T, T. & N. O. RR Survey, thence E. 656 ft. to transformer at Well No. 3.

8. Three water pipeline easements in Section 27, Blk. 2-T, T. & N. O. RR Survey, each 20 ft. in width, the center lines of which are described as:

(a) Beginning at a point 400 ft. S. of NW corner of said Section 27, Blk. 2-T, T. & N. O. RR Survey, thence N. 48° 30' E., 603.65 ft. to the North line of said Section 27 and 452.1 ft. E. of NW corner thereof;

(b) Beginning at a point 1175 ft. E. of NW corner of said Section 27, Blk. 2-T, T. & N. O. RR Survey, thence S. 71° 20' E., 3610 ft. to Water Well No. 5.

[fol. 120] (c) Beginning at a point 1546 ft. N. of SW corner of said section 27, Blk. 2-T, T. & N. O. RR Survey, thence N. 69° 30' E., 1220 ft. to Water Well No. 8.

9. A double electric transmission line easement 35 ft. in width in Section 27, Blk. 2-T, T. & N. O. RR Survey, being 17.5 ft. on each side of a center line described as:

(a) Beginning at a point 2456 ft. N. of SW corner of said Section 27, Blk. 2-T, T. & N. O. RR Survey, thence N. 72° E., 5239 ft. to transformer station at Well No. 5;

(b) A single electric transmission line Easement 15 ft. in width in Section 27, Blk. 2-T, T. & N. O. RR Survey, being 7.5 ft. on each side of a center line described as: Beginning at a point on above described line and 870 ft. Easterly from the Westerly end thereof; thence S. 12° 30' E., 670 ft. to transformer station at Well No. 8.

10. A water well, wellhouse and transformer station in Section 27, Blk. 2-T, T. & N. O. RR Survey, being an area within a radius 130 ft. from the center of Well No. 5, said well being located 4595 ft. E., and 1155 ft. S. of NW corner of said Section 27.

[fol. 121] 11. Two hard-surfaced road Easements, each being 60 ft. in width in Section 27, Blk. 2-T, T. & N. O. RR Survey, the center lines of which are described as:

- (a) Beginning at a point 1584 ft. N. of SW corner of said Section 27, Blk. 2-T, T. & N. O. RR Survey, thence N.  $69^{\circ} 30'$  E., 950 ft.; thence N.  $60^{\circ}$  E., 4313 ft. to well site No. 5 and,
- (b) Beginning at a point 970 ft. E. of NW corner of said Section 27, Blk. 2-T, T. & N. O. RR Survey, thence S.  $62^{\circ}$  E., 3340 ft. more or less to point of intersection with road easement as described above.

12. An electric transmission line and transformer-station Easement 15 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and 730 ft. N. of SW corner of said Section 28, Blk. 2-T, T. & N. O. RR Survey, thence N.  $90^{\circ}$  E., 2276 ft. to and including transformer-station at Well No. 2.

13. A double electric transmission line Easement 25 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and 1030 ft. N. of the SW corner of said Section 28, Blk. 2-T, T. & N. O. RR [fol. 122] Survey, thence N.  $72^{\circ}$  E., 4658 ft. to a point in East Section line of said Section 28 and 2456 ft. N. of SE corner thereof.

14. A water pipeline and electric-transmission line Easement, 35 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 400 ft. E. of the West Quarter corner of said Section 28, Blk. 2-T, T. & N. O. RR Survey, thence N.  $2^{\circ} 43'$  E., 2640 ft. to a point in the North Section line of said Section 28 and 525 ft. E. of NW corner thereof.



15. A hard-surfaced road easement, 60 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 891 ft. E., and 1480 ft. N. of SW corner of said Section 28, Blk. 2-T, T. & N. O. RR Survey, thence S.  $74^{\circ}$  E., 2421 ft. to Well Site No. 2, thence N.  $69^{\circ}$  30' E., 2240 ft. to point in East Section line of Section 28, and 1584 ft. N. of SE corner thereof.

16. A hard-surfaced road easement 60 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 1510 ft. E. of NW corner of Section 28, Blk. 2-T, T. & N. O. RR Survey, thence S.  $81^{\circ}$  39' E., 462 ft.; thence S.  $7^{\circ}$  50' W., 713.5 ft.; thence S.  $17^{\circ}$  57' W., 262.3 ft.; thence S.  $55^{\circ}$  48' W., 1856.9 ft.; thence S.  $42^{\circ}$  6' W., 252 ft. to the West line of said Section 28 and 396 ft. N. of the West Quarter Section corner.

17. An Easement covering 4.00 acres in said Section 28, Blk. 2-T, T. & N. O. RR Survey, for burning and disposal of waste material, described as:

Beginning at a point 1918 ft. E. of NW corner of Section 28, Blk. 2-T, T. & N. O. RR Survey, thence E. along said Section 400 ft. to a point thence S. 435 ft.; thence W. 400 ft.; thence N. 435 ft. to point of beginning.

18. A water-well and water pipeline Easement, 20 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 1861 ft. E. of the SW corner of said Section 28, Blk. 2-T, T. & N. O. RR Survey, thence N.  $59^{\circ}$  30' E., 1570 ft. to said Well No. 2, thence N.  $69^{\circ}$  30' E., 2240 ft. to a point in the East line of said Section 28, and 1546 ft. N. of the SE corner thereof.

19. A drainage ditch Easement, 20 ft. in width in said Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line [fol. 124] of which is described as:

Beginning at Well No. 2, thence in a Southeasterly direction to a point in the South line of Section 28, Blk. 2-T, T. & N. O. RR Survey, said point being 1680 ft. W. of the SE corner thereof.

20. A water pipeline Easement, 20 ft. in width in Section 28, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and 1030 ft. N. of SW corner of said Section 28, Blk. 2-T, T. & N. O. RR Survey, thence N.  $48^{\circ} 30'$  E., 5875 ft. to a point in the East line of said Section 28, and 400 ft. S. of NE corner thereof.

21. A Water pipe line Easement 15 ft. in width in said Section 37, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 891 ft. E. and S.  $0^{\circ} 14'$  E., 571 ft. of the NW corner of said Section 37, Blk. 2-T, T. & N. O. RR Survey, thence N.  $59^{\circ} 30'$  E., 1126 ft. to point in North line of said Section 37 and 1861 ft. E. of NW corner thereof.

22. A gas pipeline Easement, being 6 ft. in width in said Section 37, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 1392 ft. W. of the SE corner of [fol. 125] said Section 37, Blk. 2-T, T. & N. O. RR Survey, thence N.  $30^{\circ} 15'$  W., 5950 ft. to E. line of Government property and 137 ft. S. of N. line of Section 37.

23. A drainage ditch easement, 30 ft. in width in said Section 37, Blk. 2-T, T. & N. O. RR Survey, the center line of which is described as:

Beginning at a point 1110 ft. S. of the NE corner of said Section 37, thence N.  $62^{\circ}$  W., 1640 ft.; thence in

a northwesterly direction to a point on N. line of said Section 37 and 1640 ft. W. of the NE corner thereof.

(A Chart of the above described property is made a part hereof.) (Omitted in printing per stipulation.)

Mr. Blume: I offer in evidence the Assignment and Acceptance, the Assignment being from the Phillips Petroleum Company and the Acceptance being by Phillips Chemical Company.

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#### PLAINTIFF'S EXHIBIT NUMBER TWO

#### ASSIGNMENT AND ACCEPTANCE

WHEREAS an agreement in writing effective as of 16 August, 1948, executed on behalf of the SECRETARY OF THE ARMY on 22 July 1948 by R. C. Crawford, Major General, Acting Chief of Engineers, and executed on behalf of PHILLIPS PETROLEUM COMPANY, a Delaware corporation [fol. 126] with an operating office at Bartlesville, Oklahoma, on 23 July 1948 by R. C. Jopling, Vice President, provides for the lease of the Government-owned plant near Etter, Moore County, Texas, known as "Cactus Ordnance Works," to the said PHILLIPS PETROLEUM COMPANY, which said agreement in writing, designated Contract No. W-41-038-Eng-6047, and all exhibits attached thereto are made a part hereof with the same force and effect as though they were set forth at length herein; and

WHEREAS attached to said lease as "EXHIBIT C" is an ancillary lease agreement dated 27 July 1948 whereby the said PHILLIPS PETROLEUM COMPANY leases from the United States of America certain Government-owned railroad equipment; and

WHEREAS the aforesaid lease agreement, Contract No. W-41-038-Eng-6047, contains the following recitals, among others, in Condition 11:

"11. That the Lessee shall neither transfer nor assign this lease; nor sublet the Leased Property or any part thereof; nor grant any interest, privilege or license whatsoever in connection therewith without permission in writing from the Division Engineer; provided, however, that with written notice to the Division Engineer the Lessee shall have the right with- [fol. 127] out such permission to assign its rights hereunder to the Phillips Chemical Company, such assignment to be effective for so long as said company remains a wholly owned subsidiary of the Lessee, in which event the liability of the Lessee for performance of the terms and conditions of this lease shall remain unimpaired by such assignment: \* \* \*"

WHEREAS it is the desire of the undersigned PHILLIPS PETROLEUM COMPANY to assign and convey all of its right, title and interest in and under the aforesaid lease agreement and ancillary lease agreement to PHILLIPS CHEMICAL COMPANY, a Delaware Corporation with an operating office at Bartlesville, Oklahoma, and a wholly-owned subsidiary of PHILLIPS PETROLEUM COMPANY;

NOW, THEREFORE, For value received and effective as of the close of business 31 July 1948, the undersigned PHILLIPS PETROLEUM COMPANY hereby assigns all of its right, title and interest in, to and under the aforesaid lease agreement, designated Contract No. W-41-038-Eng-6047, and the ancillary lease agreement thereto attached as EXHIBIT C, unto PHILLIPS CHEMICAL COMPANY and, in consideration of the Government's consent hereto, the undersigned PHILLIPS PETROLEUM COMPANY hereby acknowledges that its liability for performance of the terms and conditions of the aforesaid leases shall remain unim- [fol. 128] paired by this assignment and hereby guarantees the performance by said PHILLIPS CHEMICAL COMPANY of all covenants on the part of the lessee contained in said lease agreements.

In consideration of the foregoing assignment and the Government's consent thereto, PHILLIPS CHEMICAL COMPANY hereby assumes and agrees to make all the payments, perform all the covenants and comply with all the condi-

tions on the part of the lessee contained in the aforesaid lease agreements.

IN WITNESS WHEREOF this assignment and acceptance is executed in quadruplicate, each copy for all purposes to be deemed an original, this 30th day of July, 1948.

ATTEST:

PHILLIPS PETROLEUM COMPANY

/s/ illegible  
Assistant Secretary

By /s/ C. O. STARK  
Vice President

(SEAL)

ASSIGNOR

APPROVED AS TO FORM

/s/ D. E. HODGES  
D. E. Hodges, Atty.

ATTEST:

PHILLIPS CHEMICAL COMPANY

/s/ illegible  
Secretary

By /s/ R. W. THOMAS  
Executive Vice President

(SEAL)

STATE OF OKLAHOMA )  
COUNTY OF WASHINGTON )

Before me, the undersigned authority, on this day per-  
[fol. 129] sonally appeared C. O. Stark, known to me to be  
the person whose name is subscribed to the foregoing in-  
strument and known to me to be the Vice President of  
PHILLIPS PETROLEUM COMPANY, a corporation, and acknowl-  
edged to me that he executed such instrument for the pur-  
poses and consideration therein expressed, and as the act  
of said corporation.

Given under my hand and seal of office this 30th day  
of July, A. D., 1948.

/s/ E. E. HOLDEN  
Notary Public in and for  
the County of Washington,  
State of Oklahoma.

My commission expires:

7-9-51

STATE OF OKLAHOMA       )  
COUNTY OF WASHINGTON )

Before me, the undersigned authority, on this day personally appeared R. W. Thomas, known to me to be the person whose name is subscribed to the foregoing instrument and known to me to be the Executive Vice President of Phillips Chemical Company, a corporation, and acknowledged to me that he executed such instrument for the purposes and consideration therein expressed, and as the act of said corporation.

Given under my hand and seal of office this 30th day of July, A. D., 1948.

[fol. 130]

/s/ E. E. HOLDEN  
Notary Public in and for  
the County of Washington,  
State of Oklahoma

My commission expires:

7-9-51

JOHN R. POWELL, a witness called to the witness stand by Counsel for plaintiff, being duly sworn, testified on his oath, as follows:

Direct examination.

By Mr. Blume:

Q. Will you state your name, please sir?

A. John R. Powell.

Q. You reside in Dumas, Texas?

A. Yes.

Q. Mr. Powell, have you in the past held the position of Tax Assessor and Collector of the Dumas Independent School District?

A. I have.

Q. What years did you hold that position?

A. From 1931 through '54.

Q. Through the end of 1954?

A. Well, it was August 31, 1954; I believe was the end—



Mr. Langley: We didn't get the answer on that last date. Would you speak louder.

A. It was '55 though instead of '54.

[fol. 131] By Mr. Blume:

Q. Sir?

A. It was '55 instead of '54.

Q. In the year 1954, did you prepare certain assessment sheets on property in the District which you referred to as—commonly known as—Cactus Ordnance Works?

A. I didn't actually prepare them. The attorney for the School district prepared them for me.

Q. Please tell me how that came about; that he prepared them instead of you?

A. Well, I was out of town at the time on vacation.

Q. So, the attorney for the School District wrote up the assessments and made them, did he not; is that your testimony?

A. They were delivered to me; yes; and, they were prepared at the direction of the School Board.

Q. Did those assessments cover the years 1939 through 1945, inclusive?

A. They did.

Q. I wonder if you could identify these as being the assessments or listing?

A. Those appear to be copies of the original; yes.

Mr. Blume: Would mark this as Plaintiff's Exhibit Number Three.

(Received and marked, "Plaintiff's Exhibit Number Three").

[fol. 132] By Mr. Blume:

Q. Do you know whether these copies, which I have shown you, were mailed to Phillips Petroleum Company?

A. Yes. I think I mailed them to the company, in Amarillo.

Mr. Blume: I will offer this in evidence.

Mr. Langley: We object to the introduction in evidence of these copies, which clearly appear to be copies, except for the limited purpose of showing what the assessment sheet looked like when it was originally prepared or for the purpose of showing the condition that a copy was in when it was delivered to Phillips Petroleum Company and, also, for the purpose of showing, of course, that the Phillips Petroleum Company or Phillips Chemical Company received due notice of assessment but not for the purpose of showing that the assessment sheet in such form was the assessment sheet as finally made a permanent record or for the purpose of showing that the assessment sheet in such form was an assessment sheet upon which taxes were finally assessed and put on the tax rolls.

The Court: Are you going to accept those limitations?

Mr. Blume: I don't think he stated any legal reason for his objection, your Honor. I think he named all of the reasons for which I wish to use it but I wouldn't want to be limited to those in the absence of a good reason and I [fol. 133] don't think he has stated a good reason.

Mr. Langley: The best evidence rule is the only one I am attempting to state and I believe that is a good reason.

Mr. Blume: This was introduced as a copy that we received, and, for any such purposes, why, that is the original. Mr. Powell testified to that.

Mr. Langley: No. What I am saying is that for the purpose of showing that it was a copy you received, we have no objection to it; but, we would not want it to be used or attempted to be used for the purpose of showing that a copy that you received became a final public record or the final basis upon which taxes were placed on the tax roll.

Mr. Blume: We expect to introduce the original, if that will satisfy you.

The Court: In the present condition of the record, that is the only thing that that instrument would be worth. In any event, I overrule the objection.

Mr. Langley: Note our exception.

## PLAINTIFF'S EXHIBIT NUMBER THREE

## ADDITIONAL INVENTORY OF PROPERTY

Dumas, Independent School District

[fol. 134] Owner Phillips Petroleum Company

Address P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1949 by Jno. R. Powell, Assessor Dumas Independent School District, Moore County, State of Texas.

## REAL ESTATE

All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

\* \* \* \* \*

## CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 77 of this record with the words 'That part of sections . . . ' and ending at page 86 of said record with the words ' . . . of the N.E. corner thereof.' "

\* \* \* \* \*

[fol. 146]	Total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging .....	\$10,000,000.00
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I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I through my deputy, W. E. Phillips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers

agent and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

/s/ W. E. PHILLIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this District for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or years 1949 in compliance with the laws regulating the assessment of unrendered property.

JNO. R. POWELL,  
Assessor and Collector  
Dumas Independent School District

By /s/ E. L. SHEPPARD, Deputy

(SEAL)

## ADDITIONAL INVENTORY OF PROPERTY

### Dumas Independent School District

**Owner** Phillips Petroleum Company

**Address** P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1950 by Jno. R. Powell, Assessor of Dumas Independent School District, Moore County, State of Texas.

All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improve- [fol. 148] ments, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

### CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 78 of this record with the words 'That part of sections . . . and ending at page 86 of said record with the words . . . of the N.E. corner thereof.'"

[fol. 159]	Total value of the above described realty, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging .....	\$10,000,000.00
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[fol. 160] I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I through my deputy, W. E. Phillips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers, agent and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Ama-

rillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

/s/ W. E. PHILLIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property [fol. 161] has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or years 1950 in compliance with the laws regulating the assessment of unrendered property.

JNO. R. POWELL,  
Assessor and Collector  
Dumas Independent School District

By s/ E. L. SHEPPARD, Deputy.

(SEAL)

#### ADDITIONAL INVENTORY OF PROPERTY

Dumas Independent School District

Owner Phillips Petroleum Company

Address P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1951 by Jno. R. Powell, Assessor Dumas Independent School District, Moore County, State of Texas.



All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

### CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 78 of this record with the words 'That part of sections . . . and ending at page 86 of said record with the words . . . of the N.E. corner thereof.'"

[fol. 173]	Total value of the above described realty, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging .....	\$10,000,000.00
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I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I through my deputy, W. E. Philips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers, agent [fol. 174] and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

(s) W. E. PHILIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated and I hereby assess said property for the year or years 1951 in compliance with the laws regulating the assessment of unrendered property.

JNO. R. POWELL,  
Assessor and Collector  
Dumas Independent School District

By (s) E. L. SHEPPARD, Deputy.

(SEAL)

[fol. 175]

## ADDITIONAL INVENTORY OF PROPERTY

Dumas Independent School District

Owner Phillips Petroleum Company

Address P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1952 by Jno. R. Powell, Assessor of Dumas Independent School District, Moore County, State of Texas.

All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

## CLERK'S NOTE

Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease

from the United States of America, beginning at page 77 of this record with the words 'That part of sections . . . and ending at page 86 of said record with the words 'of the N.E. corner thereof.' "

[fol. 186] Total value of the above described, realty, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging ..... \$10,000,000.00

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th. day of March, 1954, I through my deputy, W. E. Phillips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers, agent and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

/s/ W. E. PHILLIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for

the year or years 1952 in compliance with the laws regulating the assessment of unrendered property.

**Jno. R. POWELL,**  
Assessor and Collector  
Dumas Independent School District

By /s/ **E. L. SHEPPARD,** Deputy.

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## **ADDITIONAL INVENTORY OF PROPERTY**

**Dumas Independent School District**

**Owner Phillips Petroleum Company**

**Address P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1953 by Jno. R. Powell, Assessor of Dumas Independent School District, Moore County, State of Texas.**

All of the following described realty, commonly known [fol. 188] as **CACTUS ORDNANCE WORKS**, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging and more particularly described as follows, to-wit:

### **CLERK'S NOTE**

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 7 of this record with the words 'That part of sections . . . and ending at page 86 of said record with the words 'of the N.E. corner thereof.'"

[fol. 198] Total value of the above described realty, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging ..... \$10,000,000.00

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I, through my deputy, W. E. Phillips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers, agent and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

/s/ W. E. PHILLIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or years 1953 in compliance with the laws regulating the assessment of unrendered property.

Jno. R. Powell,  
Assessor and Collector  
Dumas Independent School District

By s. E. L. SHEPPARD, Deputy.

## ADDITIONAL INVENTORY OF PROPERTY

### Dumas Independent School District

**OWNER PHILLIPS PETROLEUM COMPANY**

**Address** P. O. Box 1751, Amarillo, Texas for assessment of Taxes for the year 1954 by Jno. R. Powell, Assessor of Dumas Independent School District, Moore County, State of Texas.

All of the following described realty, commonly known as CACTUS ORDNANCE WORKS, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

### CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 77 of this record with the words 'That part of sections . . . ' and ending at page 86 of said record with the words ' . . . of the N.E. corner thereof.'"

[fol. 209]	Total value of the above described realty, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging	\$10,000,000.00
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I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I, through my deputy, W. E. Phillips, proceeded to make a list of the property contained [fol. 210] in this inventory by calling upon Clay D. Carrithers, agent and employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting that the said Clay D. Carrithers to render the property contained in this inven-



tory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

/s/ W. E. PHILLIPS

Jno. R. Powell  
Assessor and Collector

(If unrendered, Assessor will fill this Certificate)

I, Jno. R. Powell Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Petroleum Company (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or years 1954 in compliance with the laws regulating Vol. 211 the assessment of unrendered property.

Jno. R. Powell,  
Assessor and Collector  
Dumas Independent School District

By S. E. L. SHEPPARD, Deputy.

(SEAL)

By Mr. Blume:

Q. Mr. Powell, do you know whether anyone made any changes on--from this document?

A. Yes, there have been some changes made. The value isn't the same.

Q. The value was lowered. Do you know who did that?

A. The Equalization Board.

Q. Were there any other changes?

A. Well, that original copy was mailed to Phillips Petroleum Company, and the final assessment copies are assessed to Phillips Chemical Company.

Q. Was that done by the Board of Equalization also?

A. Yes.

Q. Do you know when they were made—such changes as you have mentioned?

A. I assume at the Equalization Board meeting?

Q. I will hand you a Delinquent Tax Notice and ask you to state if you can identify that as one you prepared and dispatched to Phillips Chemical Company?

[fol. 212] A. I believe that is mine.

Mr. Blume: Mr. Reporter, would you identify this Delinquent Tax Notice, covering the years 1949 through 1953, inclusive, as Plaintiff's Exhibit Number Four.

(Received and marked, "Plaintiff's Exhibit Number Four").

#### OFFER IN EVIDENCE

Mr. Blume: I offer it in evidence.

Mr. Langley: No objection.

(Made a part of this record. See Page 160).

By Mr. Blume:

Q. I hand you here an instrument styled 1954 Tax Statement. Will you state whether you prepared this instrument and dispatched this copy to Phillips Chemical Company?

A. I am sure I did; yes.

Mr. Blume: Identify this as Plaintiff's Exhibit Number Five.

(Received and marked, "Plaintiff's Exhibit Number Five").

Mr. Langley: No objection.

(Made a part of this record. See Page 162).

Mr. Blume: I don't have any further questions.

## Cross examination.

By Mr. Langley:

Q. Mr. Powell, do you type all of your own assessment sheets or do you have other people type those for you?

[fol. 213] A. Well, I sometimes type them and sometime I had help on it.

Q. Was there anything unusual in this instance about someone else typing those particular sheets for you?

A. No.

Q. Were all of your assessment sheets, including these, prepared under your direction and supervision as a part of the duties of your office?

A. Yes, sir.

Q. Did you have any objection to them the way they were prepared and submitted to you?

A. No, sir.

Q. Did you assess the taxes on the basis of those assessment sheets?

A. Yes, sir.

Q. Send out a tax notice and so forth on the basis of them?

A. Yes, sir.

Q. Did you submit them to the equalization board in your opinion as assessable tax valuations of the property involved?

Mr. Boyd: I believe you are leading the witness.

Mr. Langley: He is your witness.

Mr. Blume: He is an adverse witness on my part.

Mr. Langley: He isn't employed by the defendant school district. You haven't shown any adversity.

Mr. Blume: He was employed by the defendant school district.

[fol. 214] Mr. Langley: He wasn't called for cross-examination and no statement made that he was an adverse witness.

The Court: I don't think whether it is leading or not is of any consequence. Go ahead.

By Mr. Langley:

Q. Is it a fact, Mr. Powell, that from the inception of the determination by the School Board that this property out there, or interest in it, was taxable, from that time forward to the present time that all of the actions of the School Board and Tax Assessor and Board of Equalization have been done at the advice of an attorney?

Mr. Blume: I don't believe you have qualified the witness to answer that question, have you, that all of the actions of the School Board have been done under the direction of an attorney?

Mr. Langley: He can testify to what he knows and you have a right to examine him further into his knowledge.

A. Well, these statements and so forth—all of my actions have been done on the advice of the attorneys and the School Board.

Q. And, were those assessment sheets then your actual bona fide assessment sheets as Tax Assessor and Collector for the Dumas Independent School District?

A. I didn't understand.

[fol. 215] Q. Were those assessment sheets, copies of which you have identified, the actual assessment sheets for yourself, as Tax Assessor and Collector of the Dumas Independent School District?

A. Yes.

Q. I believe you have testified that changes were made in certain parts of those assessment sheets?

A. Yes.

Q. I ask you where the proper place is for keeping the original assessment sheets?

A. Well, in the Assessor-Collector's office.

Q. And, did you place the originals of those copies that have been identified in your office as Assessor and Collector?

A. Yes.

Q. And, did they stay there during the time you were in that office as the incumbent?

A. They did.

Q. Mr. Powell, I will ask you to examine these and see if they are the original assessment sheets that came from your office as Assessor and Collector for the year 1949 through the year 1953?

A. I believe they are.

Q. And, with regard to Plaintiff's Exhibit Number Three, which was previously introduced in evidence, then, are these documents which you have just examined the originals of these carbon copies which were in Plaintiff's Exhibit Number Three for the years 1949 through 1953?

A. I am sure they are.

Q. With regard to the one for 1954, I ask you whether or not on the day of the trial, here earlier this morning, this additional copy was prepared as a substitute for an original which could not be found?

A. It was.

Q. And, I ask you whether or not you participated in a diligent search for the original of this in the office which you have vacated recently?

A. I have.

Q. Did you observe with your own eyes and see, yourself, Mr. Foreman make further search?

A. Yes, sir.

Q. And did you observe Mr. Wooten and the other school officials also make a diligent search for the original of this?

A. Yes, sir.

Q. And, do you know it to be a fact that the original is apparently lost, destroyed or misplaced and cannot at this time be found?

A. That is right.

Q. And then, I will ask you to see if the pencil markings in red on this 1954 copy are the same as were put in red on the original 1954 assessment sheet?

[fol. 217] A. I am sure that it is the same.

Q. And, I will ask you further to see if it is not a fact that the red pencil markings on all of these originals, together with that copy of 1954, were placed on there by the Board of Equalization at a meeting held during August and September, 1954?

A. That is right.

Q. And, in all such cases, the marks were so placed?

A. That is right.

#### COLLOQUY BETWEEN COUNSEL

Mr. Langley: And, for the purpose of the record, I believe it can be stipulated that in each case and in regard to the original assessment sheets for each of the years in question that on the first page thereof, near the top in the name of the Owner, the word "Petroleum" was stricken and "Chemical" was substituted, thereby making the name of the Owner to be Phillips Chemical Company and that the same change was made in the certificate of the Assessor and Collector on the back of that same original page and that for the year 1949, near the end of the property description, on the stapled together pages attached to the original, the phrase "Except that wholly owned by Phillips Chemical Company" was added to the summary description of the property at the bottom of the page and that the valuation of Ten Million Dollars was [fol. 218.] replaced by a valuation of Three Million One Hundred and Sixty Nine Thousand Seven Hundred and Ninety Dollars; and, for the year 1950, in addition to the general changes with regard to the property description and the same phrase being added, the valuation was changed from Ten Million Dollars to Four Million Five Hundred and Sixteen Thousand Eight Hundred and Ninety Four Dollars; and, that for the year 1951, in addition to the other changes, the same phrase was added.

Mr. Blume: I believe in the record that won't appear clear when you refer to general changes and in addition to the other changes.

Mr. Langley: All right. For each of the years, then let the record show that the Ownership was changed from Phillips Petroleum Company to Phillips Chemical Company in two places and that for each of the five years the phrase "except that wholly owned by Phillips Chemical Company" was added to the general summary of the property description and that for some of the years, being 1949 and 1951, a certain section number was added, to wit:



Section 36, in the very beginning of the property description, which was inadvertently omitted by typographical error and all other changes were in valuation. We showed the changes for 1949 and 1950. Then, for 1951, the change was from Ten Million Dollars to Four Million One Hundred and sixty eight thousand and Ninety One Dollars. For the year 1952, the valuation was changed from Ten Million Dollars to Five Million Three Hundred and Thirty Five Thousand Three Hundred and Eighty Seven Dollars. For the year 1953, the valuation was changed from Ten Million Dollars to Five Million Two Hundred and Thirty Two Thousand Three Hundred and Sixty Six Dollars. And, in addition, for that year, I see in blue pencil a notation, which as far as I am concerned is not necessarily introduced in evidence but appears to be fairly immaterial to this inquiry, the word "tax" is put in there and the figure of \$65,927.81, which as far as I am concerned, was probably not added to the Board of Equalization but is immaterial. The material changes are shown in red pencil. Then, for the year 1954, the valuation was changed from Ten Million to Five Million Three Hundred and Fifty Eight Thousand Five Hundred and Sixteen Dollars.

Mr. Blume: I would agree to that shorthand statement but I would like to introduce as an example of how the changes were made portions of one of the years; that is, I would like to introduce or have you introduce, if you will, this principal part to which the description is attached plus the last page of the description.

Mr. Langley: You mean for the purpose of showing [fol. 226] how it was made?

Mr. Blume: Yes.

Mr. Langley: Is it your intention to incorporate a part of the record photostatic copies of one of these to go with the record?

Mr. Blume: Yes, sir.

Mr. Langley: Just to show the method used in changing?

Mr. Blume: That is right.

Mr. Langley: We have no objection but would prefer that an entire year be introduced in order to keep it from being separated from each other.

Mr. Blumer: That will (see) satisfactory.

Mr. Langley: One year that is already detached from the others in the year 1953, if you have no objection to it, and it would likewise show that figure that I do not particularly care about.

Mr. Blumer: That will be fine.

Mr. Langley: Then, I will ask the Reporter to put as Defendant's Exhibit Number One the Original Assessment Sheet entitled Additional Inventory of Property for the year 1953.

#### DEFENDANT'S EXHIBIT NUMBER ONE

#### ADDITIONAL INVENTORY OF PROPERTY DUMAS INDEPENDENT SCHOOL DISTRICT

Chemical  
Fol. 221 Owner: Phillips Petroleum Company

Address: P. O. Box 1754, Amarillo, Texas for assessment of taxes for the year 1953 to J. R. Powell, Assessor of Dumas Independent School District, Moore County, State of Texas.

All of the following described lands, commonly known as Cactus Oil Lease Works, including buildings, improvements, fixtures, machinery, and appurtenances thereto, belonging, and more particularly described as follows, to-wit:

#### Cactus Oil

"Here below, approximately ten pages of legal descriptions of seven tracts of land and twenty three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 37 of this record with the words 'That part of sections 1 and ending at page 80 of said record with the words 'of the N.E. corner thereof.'"

fol. 233: Total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances, the same belonging \$ 5,232,366.  
 #10,000,000.00

Except that wholly owned by Phillips Chemical Company  
 Tax 65,327.81

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that on the 24th day of March, 1954, I, through my deputy, W. E. Phillips, proceeded to make a list of the property contained in this inventory by calling upon Clay D. Carrithers, agent and fol. 234 employee of Phillips Petroleum Company, and head of the tax division for Phillips Petroleum Company at his office in the First National Bank Building of Amarillo, Texas, and by requesting the said Clay D. Carrithers to render the property contained in this inventory for the designated year, and to make statement under oath as required by law. The said Clay D. Carrithers refused on behalf of the Phillips Petroleum Company to render the property contained in the inventory for tax purposes or to swear to the same on the said date.

s. E. E. Phillips

Jno. R. Powell  
 Assessor and Collector

If untendered, Assessor will file this Certificate

I, Jno. R. Powell, Assessor and Collector of Dumas Independent School District, do hereby certify that this inventory contains a true and correct list of property subject to taxation in this district for the year or years designated.

Chemical  
 known as the property of Phillips Petroleum Company, if owner is unknown, say unknown which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or

years 1953 in compliance with the laws regulating the assessment of unimproved property.

John R. Powell, Assessor and  
Collector, Dumas Independent School  
District

By (s) E. L. Sheppard, Deputy

(SEAL)

Cross examination (continued).

By Mr. Langley:

Q. I hand you, Mr. Powell, a large bound volume and ask you to tell me what it is, please?

A. Those are the tax rolls for several years.

Q. For what taxing authority purposes?

A. Dumas Independent School District.

Q. Were those prepared by you or under your direction during the time that you were Tax Assessor and Collector?

A. They were.

Q. What years are bound within that bound volume, please, sir?

A. '49 through '54.

Q. I ask you then if those are the years that we have been discussing here in Court?

A. They are.

Q. Now, I want to hand you these original assessment sheets that have been introduced in evidence, with the exception of 1951 and 1952. If you will take each of these assessment sheets and turn to the place fol. 230 in your tax rolls where those taxes were placed on the rolls for each of the years in question. Now, you have before you the roll for the year 1954 and you are comparing it with the assessment sheet for 1954 and do you find the same valuation figure?

A. I do.

Q. And, who is shown on the tax rolls to be the person against whom that tax is assessed?

A. Phillips Chemical Company.

Q. Does it have under that "Cactus Ordnance Works"?

A. It does.

Mr. Blume: I think that I will want you to read the entire entry into the record if you are going to handle it that way.

By Mr. Langley:

Q. Mr. Powell, will you take those assessment sheets that we looked at and for each year turn to the page on the tax rolls where that assessment was entered on the roll and read the full entry that you find in each instance, giving the year for which you find it; give the valuation and how it was put on the roll and the amount of taxes due and so forth?

Mr. Blume: I have an objection that you haven't shown the rolls to be properly certified.

Mr. Langley: All right.

By Mr. Langley:

Q. Mr. Powell, in the first place, are you now in the 1954 fol. 237 roll?

A. Yes, sir.

Q. And, is that roll certified by you as Tax Assessor and Collector as being the properly completed and certified roll for the Dunbar Independent School District for the year 1954?

A. It is.

Q. Then, will you turn to the—

Mr. Blume: I don't believe you have covered the certification by the Board of Equalization and approval of the roll.

Mr. Langley: The Statute does not require that the roll be signed by the Board of Equalization.

Mr. Blume: What?

Mr. Langley: The Statute does not require that the roll be signed by the Board of Equalization.

Mr. Blume: That is your conclusion.

Mr. Langley: That is what the Statute says. It says approved but doesn't say signed.

Mr. Blumer: Have you proved an approval of the roll?

By Mr. Langley:

Q. Was that roll approved by the Board of Equalization for the Dunbar Independent School District prior to the time you approved that roll as being correct?

A. Yes, sir. They arrived at the figures we would use for the basis of the assessment and the tax rate and those were computed and placed on the tax roll.

[fol. 238] Q. And, was the roll approved by the Board of Equalization after the roll was typed?

A. Well, no, not formally, I don't think, or, I don't know that it was.

Q. I ask you if you have a certificate on here signed by the Board of Equalization?

A. I do have a certificate signed by the Board of Trustees.

Q. And, as to the Board of Equalization, you are not sure about that?

A. No.

Q. Does the Board of Equalization customarily approve your tax rolls each year?

A. No, I don't think they have ever been formally approved by the Board of Equalization. I certify that I have prepared this roll and the assessment in accordance with the tax rate and the values adopted.

Q. In accordance with the valuation put on the property by the Board?

A. Yes, sir.

Q. Was that roll for 1954 so done and so entered by you?

A. It was.

Mr. Langley: Is it your contention that that is still not sufficient?

Mr. Blumer: I still object to its admission.

By Mr. Langley:

Q. I ask you, Mr. Powell, if that roll was submitted to [fol. 239] and approved by the Board of Trustees?

A. Yes, sir, it has been.

Q. And, I ask you whether or not the Board of Equaliza-



tion was composed of three members of the Board of Trustees?

A. It is.

Q. And then, I ask you whether or not the members of the Board of Equalization all joined in the approval of that roll?

A. Well, we have Homer Foreman, Byron Smith, George Murphy and Carl Troutman who signed it.

Q. Were the members of the Board of Equalization Carl Troutman, George Murphy and Homer Foreman?

A. Yes, sir.

Q. And did they approve that roll then?

A. Yes, they have.

Q. Then, will you turn to that entry that we have talked about?

A. Yes.

Mr. Langley: I believe that is sufficient.

Mr. Blumer: I will accept that for the year 1954.

A. This is in the name of Phillips Chemical Company and below that, in parentheses, "Cactus Ordnance Works, that part of Sections 20, 28, 29, 36, 37 and 38, Block 2 T, T. & N.O. RR Survey, Moore County, Texas, 1538.31 acres, more or less, including buildings, fixtures, machinery, improvements and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company, Value Five Million Three Hundred and Fifty Eight Thousand, Five Hundred and Sixteen Dollars, total taxable property, the same value, and total tax Sixty Seven Thousand Five Hundred and Seventeen Dollars and Thirty Cents" and when paid is blank.

Q. Mr. Powell, I ask you then if that is the official original tax roll for the Dumas Independent School District for that year?

A. It is.

Q. Showing that there has been levied and assessed against Phillips Chemical that amount of taxes on that property?

A. That is right.

Q. On the interest of the Phillips Chemical Company in that property?

A. That is right.

Q. Now then, will you turn to the year 1953?

Mr. Langley: I might ask Counsel if they will stipulate as to asking the same question that none of the taxes shown on that roll have been paid; that is, that particular entry of taxes for each of these years - the taxes in question, in other words?

Mr. Blume: We will stipulate that we have paid none of the taxes which are the subject matter of our petition.

[fol. 241] Mr. Langley: That is all that I am after. In other words, it is my understanding that these taxes are the subject matter of our lawsuit and I think they have not been paid in fact and I think, in the interest of saving time, I think we can stipulate that these particular entries on these particular assessment sheets, as reflected in the tax roll, have not been paid.

Mr. Blume: We will stipulate that we have not paid those particular entries.

By Mr. Langley:

Q. On the 1953 tax rolls - first, Mr. Powell, was that roll likewise approved the same way and manner that the 1954 roll was approved?

A. I don't have the signatures of the Trustees on that.

Q. You don't have the signatures. Was the roll, in fact, approved by the Board of Equalization or the School Board comprising the Board of Equalization?

A. Yes, sir.

Q. And, did you personally secure that approval from the Board of Trustees?

A. Yes, sir. I have notified them that I have the tax roll ready and the statements are going out.

Q. And, has it been your practice over the years - you were Tax Assessor and Collector, by the way; for how many years?

A. About twenty four years.

Q. And, has it been your practice and have you worked [fol. 242] with the Board during those years so that they have approved your roll in that way and manner in some years?

A. Yes, sir, they have.

Q. And, has there been any objection raised by any member of the Board to the roll?

A. No.

Q. And, are there a number of years during the twenty-four years that you were Assessor and Collector that your signature alone appeared on the certificate of approval?

A. That is right.

Mr. Langley: Do you have any objections?

Mr. Blume: I object that the roll which is shown to be a supplemental roll is not shown to have been approved by the Board. Mr. Powell didn't testify that it had. He just said they didn't disapprove it as far as he knew and there is no certificate of any sort on it by Mr. Powell or anyone else.

By Mr. Langley:

Q. I will ask you this question: Were these taxes for the year 1953 done and approved by the Equalization Board that met in 1953?

A. Yes, sir.

Q. These particular ones that we are talking about here?

A. This one—this particular assessment.

Q. Was approved by what Equalization Board?

A. The Equalization Board of '54.

fol. 243] Q. And, the one we have already testified

A. All of these prior years have been approved but they were made by the Board of Equalization for the year 1954.

Q. And, whether or not the Board of Equalization for the year 1953 or the year '52 or the other prior years signed the roll makes no difference as to these particular taxes since they were done in 1954?

A. That is correct.

Mr. Langley: Do you still object?

Mr. Blume: I don't think he has testified to a certification or approval by the 1954 Board, did he?

Mr. Langley: Yes, sir. He testified that those members of the Board signed that 1954 roll and that they thereby approved it. They signed it in 1954.

A. In the year 1954 all of these assessments for the prior years were made.

Q. Let me ask you if all of these entries in the prior years were in the books when this was approved by the members that you have testified about—all of these other entries we have talked about here were so approved?

A. I don't remember exactly when I put these entries on here but it was after the Board met last in '54, you see, and these assessments had been made at that time.

Q. What is the date of this approval?

A. November 22nd.

[fol. 244] Q. What year?

A. 1954.

Q. And, was that after all of these taxes off of the assessment sheets we have been talking about were put on the roll?

A. Yes, sir.

Q. They were all in this book and put on the rolls by the same board at the same time?

A. Yes, sir. After you arrived at these final values, I put each of those entries on the tax rolls for that particular year.

Mr. Blume: I object to this line of questions because the certificate is limited to the tax roll for the year 1954.

The Court: Overrule the objection.

By Mr. Langley:

Q. Go ahead and testify now as to the entry for 1953?

A. "Phillips Chemical Company, parts of Sections 20, 28, 29, 36, 37 and 38, Block 2-T, T. & N.O. RR Survey, Moore County, containing 153.34 acres, more or less, commonly known as Cactus Ordnance Works, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company.

Mr. Blume: Will you state the Column Heading?

A. Personal property. "Value Five Million Two Hundred and Thirty Two Thousand Three Hundred and Sixty [fol. 245] Six Dollars. Total taxable property the same.

total tax, Sixty Five Thousand Nine Hundred and Twenty Seven Dollars and Eighty One Cents."

Q. Now, will you go to the year 1952?

Mr. Blume: I take it we may have our same objection to the introduction of that?

The Court: Yes, sir.

A. "Phillips Chemical Company, parts of Sections 20, 28, 29, 36, 37 and 38, Block 2 T, T. & N.O. RR Survey, Moore County, Texas, containing 1538.31 acres, more or less, (commonly known as Cactus Ordnance Works) including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company" and, in the personal Column, "Five Million Three Hundred and Thirty Five Thousand Three Hundred and Eighty Seven Dollars, total taxable property the same; total tax Fifty Three Thousand Three Hundred and Fifty Three Dollars and Eighty Seven Cents."

Q. Go to the year 1951?

Mr. Blume: Same objection.

The Court: Overrule the objection.

A. "Phillips Chemical Company, parts of Sections 20, 28, 29, 36, 37 and 38, Block 2 T, T. & N.O. RR Survey, Moore County, Texas, containing 1538.31 acres, more or less (commonly known as Cactus Ordnance Works) including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company" and in the Personal Column

Mr. Blume: State the heading of the column?

A. Personal Property, "Four Million One Hundred and Sixty Eight Thousand and Ninety One Dollars; total taxable property, Four Million One Hundred and Sixty Eight Thousand and Ninety One Dollars; total tax Forty One Thousand Six Hundred and Eighty Dollars and Ninety One Cents."

Q. Now, then, will you go to the year 1950?

Mr. Blume: Same objection.

The Court: Overruled.

A: "Phillips Chemical Company, parts of Sections 20, 28, 29, 36, 37 and 38, Block 2 T. T. & N.O. RR Survey, Moore County, Texas, containing 1538.31 acres, more or less, commonly known as Cactus Ordnance Works including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company, Personal Property, Four Million Five Hundred and Sixty One Thousand Eight Hundred and Ninety Four Dollars; Total taxable property, Four Million Five Hundred and Sixteen Thousand Eight Hundred and Ninety Four Dollars; Total tax Forty Five Thousand One Hundred and Sixty Eight Dollars and Ninety Four Cents."

Q. Go to the year 1949, please?

(fol. 217) Mr. Blume: Same objection.

The Court: Overruled.

A: "Phillips Chemical Company, Parts of Sections 20, 28, 29, 36, 37 and 38, Block 2 T. T. & N.O. RR Survey, Moore County, Texas, containing 1538.31 acres, more or less, commonly known as Cactus Ordnance Works including building, improvements, fixtures, machinery, and appurtenances, thereto belonging, except that wholly owned by Phillips Chemical Company, Personal Property Three Million One Hundred and Sixty Nine Thousand Seven Hundred and Ninety Dollars; total taxable property, Three Million One Hundred and Sixty Nine Thousand Seven Hundred and Ninety Dollars; total tax Thirty One Thousand Six Hundred and Ninety Seven Dollars and Ninety Cents."

Mr. Eargle: No further questions.

Redirect examination.

By Mr. Blume:

Q. Would you state the Caption on the sheet on which the certificate we were discussing appears for the year 1954 so that we may identify it properly?



A. Recapitulation, Entire Roll, 1954, Real and Personal Property Rendered for Taxation for the year 1954.

Q. That is a sheet on which your certificate and the Trustees' Certificate appears, is it not?

A. It is.

[fol. 248] By Mr. Boyd:

Q. Mr. Powell, I would like to ask you some questions now concerning the assessment sheets for the years 1949 through 1954, inclusive, and I believe that you testified that the assessment sheets were prepared by attorneys of the School District; is that correct?

A. That is correct.

Q. And, if I understand you correctly, then, the assessments were not made by you?

A. Well, I put the assessment sheets in with the other assessment sheets, you see—

Q. In other words, after the assessment sheets were made up, then, in preparing the tax rolls from the assessment sheets, you put them all in alphabetical order and transcribed them to the rolls?

A. That is right.

Q. But, the assessments weren't made by you?

A. No, I didn't actually make up that assessment sheet.

Q. Now, in examining the assessment sheet, for instance, for 1954 we see the original value placed thereon was Ten Million Dollars and the value as changed by the Board of Equalization is Five Million Dollars plus and that value is set opposite a description as follows: "All of the following described realty, commonly known as Cactus Ordnance Works, including buildings, improvements, fixtures, machinery and appurtenances thereto be [fol. 249] long and more particularly described as certain tracts and including easements and concluding with the total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company; is that value set forth there then the assessed value on the property described on the sheet would that be your understanding?

A. That is the assessed value of all property described on this sheet from here through here. (Indicating).

Q. Yes, sir?

A. That is all of this property that is described in detail here. It has a final value of this. (Indicating).

Q. Now, is it your understanding, from reading that, that that is the full fee assessed value for this property particularly described here?

A. Yes, for all the property that is described on here, except that wholly owned by Phillips Chemical Company.

Q. And then, I believe we could conclude from that that the leasehold of Phillips Chemical Company is not described on this sheet, is it?

A. Well, I don't know.

Q. You wouldn't consider this description as describing the leasehold of Phillips Chemical Company?

Mr. Langley: We object to that question on the ground [fol. 250] that it is leading and for the further reason that the assessment sheet speaks for itself and doesn't need any interpretation.

The Court: I sustain the objection on the ground that the instrument speaks for itself.

Mr. Langley: If the witness answered, we would like to move that his answer be stricken. I am not sure. I didn't hear his answer. If he did, we want his answer stricken from the record.

The Court: All right.

A. I don't believe I answered that question.

By Mr. Boyd:

Q. Let me ask you this question then: Mr. Powell, if you had been making the assessment yourself and had been intending to place a value on the full fee value of the property particularly described here, would you have done it exactly as it is done on this sheet?

A. Well, I don't know how I would have described it because I didn't have this detailed description of all of the property out there.

Q. But, if you had a detailed description and had that description attached on here and wanted to assess that

described property at its full fee value, then, would you have put the value out here and left the description of the property as it is?

A. Well, I don't know whether I would have or not. (fol. 251.) Q. How would you have changed it?

A. If I had been doing it I would have probably had a lot more brief a description than there is here but it wasn't done that way. I didn't prepare the assessment sheet the description of the property.

Q. And, if you had been intending to describe a leasehold of Phillips Chemical Company in this property, would you not have specified that on the sheet?

A. I don't know that I would have.

Q. Why?

A. Well, I haven't had that decision to make in the matter.

Q. Now—

A. And, I didn't prepare this.

Q. I understand that but we are trying to find out wouldn't it have been logical?

Mr. Langley: That certainly calls for a conclusion of the witness on a highly speculative matter and the witness hasn't been shown qualified to answer and that goes into the realm of speculation which is beyond the scope of legitimate examination.

The Court: I don't think the witness could bind either party as to what he would have done. I sustain the objection.

By Mr. Boyd:

Q. Let me ask you this, Mr. Powell: In looking at this sheet, do you consider that the value placed on this sheet (fol. 252) is the full fee value of the property described was it put on there for that purpose?

Mr. Langley: Again, Your Honor, we object because it is not shown that this witness knows what the Board of Equalization had in mind when they put it on there.

The Court: I sustain the objection.

By Mr. Boyd:

Q. Is it my understanding, Mr. Powell, that you had nothing to do with the preparation of this assessment, although your certificate here on the back says that it was prepared at your instance; that is not true; is that right? It was not prepared as a function of your office; is that right?

A. It was prepared as a function of my office, just like

Q. It wasn't prepared by you?

A. No, it wasn't.

Q. And, you don't understand anything about it; you don't understand the rendition sheet at all?

Mr. Langley: We object to him intimidating his own witness and leading his witness and testifying for him.

Mr. Boyd: I am simply trying to ascertain if he knew nothing about it as you say he did.

Mr. Langley: We object on the ground that you are testifying for your witness.

The Court: I will sustain it on the basis of being argumentative.

Mr. Blumer: I would like to ask a few questions with leave of Counsel. I know it is improper to have two attorneys question the same witness but it will save a middle man.

Mr. Langley: All right.

By Mr. Blumer:

Q. Did you direct what property was to be put on the assessment lists?

A. I don't know that I fully understand your question.

Q. Did you specify which property was to go on the assessment lists prepared or did someone else do that?

A. No; I make up the list of all property.

Q. Did you specify the property which was to be included on the assessment list prepared?

A. No, it wasn't my decision to put that on there. The Board of Trustees decided that that assessment should be made against the Phillips Chemical and I carried through from there as to the matter of putting it on tax rolls.

Q. Then, you didn't specify which property was to be listed?

A. I didn't specify that particular property; no.

Q. Did you specify the value to be put on the property?

A. No.

Mr. Blume: I would like to move that all of the Original Assessment Sheets introduced by the Defendants be [fol. 254] stricken as not being official acts of the School District and not being properly introducible in this cause because it is shown that Mr. Powell abdicated his functions and didn't perform the functions of his office from the questions submitted.

The Court: Overruled.

By Mr. Blume:

Q. I believe you have testified that you didn't add any of the language to the original assessment sheets, have you not?

A. No. I suppose that the attorneys or the Board of Equalization and the attorneys for the School District added that additional language down there.

Q. Therefore, you wouldn't attempt to be in a position to know what the language added means; would you?

The Court: Do you understand his question?

By Mr. Blume:

Q. I am referring in particular to the addition "Except that wholly owned by Phillips Chemical Company." Do you know what was intended by that language?

Mr. Langley: The witness has testified that that was added by the Board of Equalization and I don't know why he should be called upon to say why they added it or what they meant. The instrument speaks for itself.

The Court: I believe it would be material as to what his understanding of it is and I sustain the objection.

[fol. 255] Mr. Blume: That is all.

Recross examination.

By Mr. Thomas:

Q. Mr. Powell, is it true that you were instructed by the Board of Trustees for the Dumas Independent School District to cooperate with their attorneys in the preparation of this assessment for each of these five years, 1949 through 1954?

A. Yes. That is correct.

Q. And, were these assessments which you have testified about, pertaining to the years 1949 through 1954, prepared under your direction and supervision as Tax Assessor and Collector of the Dumas Independent School District?

A. They—will you—

Q. Were they prepared under your direction and supervision for you and on your behalf as Tax Assessor and Collector?

A. Yes.

Q. And, when you say you didn't prepare them you mean by that, I take it, that you didn't do the typing yourself?

A. No, I didn't. All that description and the typing, I done none of it.

Q. And, if they were prepared under your direction and supervision, were they a product of your office or function of your office?

A. Yes, they were.

Mr. Blume: That calls for a conclusion, I believe.

(fol. 256) By Mr. Thomas:

Q. Now, Mr. Powell, you were asked awhile ago as to whether or not you gave any instructions as to what property was to be assessed and I will ask you this question: Did you at any time direct and was it under your supervision that the so-called Cactus Ordnance Works was assessed?

A. Yes.

Q. When you answered the question awhile ago, were you referring to the detailed legal description which you did not give?



A. I did not give; no.

Q. But, did you refer to it as the Cactus Ordnance Works or the Cactus Ordnance Plant?

A. Yes.

Q. And, that was so prepared under that direction, was it not?

A. Yes. The renditions were prepared and delivered to me.

Q. And, is it true that the source of that detailed legal description was from the Phillips Chemical lease; do you know that for a fact?

A. Well, I assumed that that is where the information came from.

Q. When you, Mr. Powell, signed each of these assessment sheets for the years 1949 through 1954, did you intend thereby, as Tax Assessor and Collector, to assess [fol. 257] those taxes against the Phillips Chemical Company?

A. Well, I didn't actually sign them.

Mr. Blume: I have an objection. I don't believe that you have established that he signed those and, in fact, I don't see that he did.

A. They were signed by Sheppard in the office.

By Mr. Thomas:

Q. Was Sheppard a Deputy Tax Assessor and Collector for the Dumas Independent School District?

A. He has helped me in the tax work for a number of years.

Q. And, was he during the year 1954 serving as a Deputy Tax Assessor and Collector?

A. He worked all the time or did each year—he worked, helping me assess and collect the taxes—worked them up in detail in assessing the ownerships.

Mr. Thomas: That is all.

Redirect examination.

By Mr. Blume:

Q. I don't believe your answer was clear. Did M. Sheppard work as Clerk or as a Deputy?

A. Well, he is a Clerk I presume. I have no the law creating a district doesn't provide for any deputy collectors. It just provides for an Assessor and Collector and that was done in my absence. I was out of town at the time these were delivered and Sheppard signed them and, of course, that was with my approval. Had I been there, [fol. 258] I would have signed them.

Mr. Blume: I move that we strike these, again. Your Honor, on the additional ground presented here that they were not made by Mr. Powell or by his deputy but by a clerk.

The Court: What is the plaintiff trying to enjoin.

Mr. Blume: The attempt to collect taxes.

The Court: I don't believe there is any issue here made as to the handling of the tax rolls.

Mr. Blume: We have one issue that they have not is more or less a subsidiary issue and I apologize your Honor for taking so much time but we do have one issue that there was never a proper assessment and I say subsidiary only in the sense that it would invalidate these particular assessments, whereas our other issues that we are trying would perpetually enjoin the assessment.

Mr. Langley: For the purpose of the record, I might as this one question.

By Mr. Langley:

Q. Did Mr. Sheppard have the authority from you to sign those assessment sheets as he did?

A. Yes, sir. He had authority to do anything necessary in the office.

Q. Was he acting within the scope of his authority from you in signing them?

[fol. 259] A. Yes.

Q. Was his signature, in effect, your signature?

A. Yes. It was just as good as if I had signed it.

Q. Was he acting for you in your absence from town as Tax Assessor?

A. Yes, sir.

Q. As your authorized substitute?

A. Yes, sir.

Q. Is there any difference, in your opinion, between his signature on there and your own signature, if you had been in town?

A. No, not in my opinion, because he has always—since he has been there and since I have been collecting taxes, he has worked with me.

Q. How many years did he work for you altogether?

A. Six or seven years, I guess.

Q. And, during all of that time, did he sign assessment sheets?

A. He did whatever was necessary.

Q. And, tax notices?

A. Yes, sir.

Q. And, tax receipts?

A. Yes, sir.

Q. And, signed Jno. R. Powell?

A. By Sheppard; and other employees in any office have [fol. 260] done the same.

Mr. Blume: Since we have this issue in the case, I wouldn't want to waive it and I would ask you to rule on my objection.

The Court: I overrule the objection.

Mr. Blume: We have no more questions from Mr. Powell.

Mr. Langley: No further questions.

(Witness excused).

HOMER FOREMAN, a witness called to the witness stand by Counsel for Plaintiff, being duly sworn, testified on his oath, as follows:

Direct examination.

By Mr. Blume:

Q. Will you state your name, please, sir?

A. Homer Foreman.

Q. Do you have any official capacity with the Damas Independent School District at present?

A. Just Tax Assessor and Collector.

Q. What capacity did you hold in 1954?

A. I was a member of the Board.

Q. Were you also a member of the Board of Equalization?

A. Yes, sir.

Q. Did you attend and participate in a certain meeting on or about August 9, 1954, wherein there was considered [fol. 261] certain assessments against what is commonly referred to as the Cactus Ordnance Works?

A. Yes, sir.

Q. Was considerable testimony introduced at that hearing regarding the value of the Cactus Ordnance Works?

A. Yes, sir. I think there was quite a bit on both sides.

Q. What was the nature of that testimony; was it directed at an ascertainment of the full market value of the Cactus Plant?

A. I don't know if I got your question just right.

Q. What was valued there was the full interest in the Cactus Ordnance Works, was it not; not just a leasehold interest. That was the nature of the testimony introduced, was it not?

Mr. Langley: That is a leading question, Your Honor, and we object to it for that reason.

Mr. Blume: I believe this is an adverse witness, Your Honor, and I am entitled to lead him.

The Court: I am not sure about that point and I have a question about the admissibility on other points. I overrule the objection.

Mr. Langley: We object for the further reason that the testimony before the Board of Equalization would be the best evidence of what it was--what it was designed to be--and that the opinion of this witness at this time, more than two years later, as to what the object of the [fol. 262] testimony was and what was attempted to be ascertained would be a mere conclusion and opinion and, likewise, on the grounds of relevancy, because of the fact that the valuation question is supposed to be specifically excluded from this hearing today.

The Court: Let's hear the question again before we discuss it further.

.. (The reporter read the last question asked).

Mr. Blume: In reply to the objection, we are not attempting to go into the valuation as such. We are just trying to show that what was actually assessed was the fee value and that the fee was assessed and the testimony at the Board of Equalization is significant as to what was assessed.

The Court: I doubt whether that testimony would be material here and whether it could be developed in this way. I will sustain the objection.

Mr. Blume: Note our exception; and, if your Honor is excluding the testimony entirely, we will want to take a bill of exceptions to show what he would have testified to.

The Court: As I remember the question it was what the nature of the testimony was there before the Board of Equalization and I will let the ruling stand. You can [fol. 263] go ahead and develop further testimony from him for the purpose of your record.

[fol. 264] (Witness excused).

Mr. Blume: That is all of our bill of exception.

By Mr. Blume:

Q. I hand you a letter, Mr. Foreman, and ask you if that is your signature on it?

A. Yes, sir.

## OFFER IN EVIDENCE

Mr. Blume: I would like to introduce this letter in evidence. I will introduce only the second paragraph.

[fol. 265] Mr. Thomas: We are going to object to this on the same grounds; that it is completely immaterial and irrelevant. I assume that it is being offered to have some bearing on the legal interpretation of the assessment, as to whether or not the Board of Equalization attempted to assess the fee simple or the leasehold interest and, again, we take the position that that is a matter of interpreting the instrument itself—the assessing for each year—and I don't see how a letter or any other instrument signed at any other time by any member of the Board of Equalization would have any bearing.

Mr. Blume: We think it is an admission by a party that they taxed the fee instead of the leasehold.

The Court: I will sustain the objection.

Mr. Blume: Note our exception.

## PLAINTIFF'S EXHIBIT NUMBER SEVEN

September 18, 1954

Phillips Chemical Company  
Box 1751  
Amarillo, Texas

Attention: Tax Department

Dear Sirs:

(Paragraph 1 not offered):

You are also notified that the Board of Equalization [fol. 266] has found that your property, commonly referred to as the Cactus Ammonia Plant or Cactus Ordnance Works, is taxable for the years 1949 through 1954, and that the assessed values have been fixed by the Board for each of the said years. You may also appear on said



date and at said place to present any additional evidence you may have pertaining to such property.

s/ George Murphy  
s/ Homer Foreman  
s/ Carl Troutman

BOARD OF EQUALIZATION OF THE DUMAS  
INDEPENDENT SCHOOL DISTRICT

(Following Rubber Stamped Printing  
Appears on Said Exhibit)

RECEIVED  
SEP 22 1954  
TAX DEPT  
AMARILLO, TEXAS

The Court: Let's take a fifteen minute recess.

After Recess

Mr. Blume: That is all the questions we have for Mr. Foreman.

Cross examination.

By Mr. Langley:

Q. You are Homer Foreman and you were on the stand [fol. 267] just before the recess and you are the duly constituted and acting Tax Assessor and Collector of the Dumas Independent School District now?

A. Yes, sir.

Mr. Langley: I ask you to mark this, please, as Defendant's Exhibit Number Two.

(Received and marked, "Defendant's Exhibit Number Two").

By Mr. Langley:

Q. Mr. Foreman, I hand you Defendant's Exhibit Number Two and ask you if that is the Additional Inventory

of Property comprising the assessment sheet for the Cactus Ordnance Works as assessed to Phillips Chemical Company for the year 1953?

A. Yes, sir.

Q. And, if it contains, attached to it, a property description similar to that or identical with that found on the other assessment sheets for the prior years 1949 through 1954?

A. Yes, sir.

Q. And, I ask you if it is not true that at the end of the description that a total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging (except that wholly owned by Phillips Chemical Company) is Ten Million Dollars?

A. Yes, sir.

[fol. 268] Q. Was that assessment prepared by you, or under your direction in your office?

A. Yes, sir.

Q. That was prepared in your office under your direction or by you?

A. Yes, sir.

Q. And, did it constitute the assessment of the interest of Phillips Chemical Company in the Cactus Ordnance Works for the year 1955?

A. Yes, sir.

Q. Was that assessment presented to the Board of Equalization for the Dumas Independent School District for the year 1955?

A. Yes, sir.

Q. What did they do to the Ten Million Dollar valuation that you had placed on the assessment?

A. Well, they reduced it to this figure here.

Q. Which was?

A. Five Million Three Hundred and Fifty Eight Thousand Five Hundred and Sixteen Dollars.

Q. And, was that figure placed on your tax roll?

A. Yes, sir.

Q. Can you find the place in your 1955 tax roll where it was placed?

A. Yes, sir.

[fol. 269]. Q. That is Page what, now?

A. Page 73.

Q. And, read the roll as it pertains to that property, please, sir?

A. "That part of Sections 20, 28, 29, 36, 37 and 38, Block 2-T, T. & N.O. RR Survey, Moore County, Texas, 1538.51 acres, more or less, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging, except that wholly owned by Phillips Chemical Company—"

Q. Before you go ahead, let me ask you this:—What name is that assessed in, please?

A. Phillips Chemical Company.

Q. And then, the next entry is a figure; is that correct?

A. Yes, sir.

Q. And, is that in the Value Column?

A. Yes, sir.

Q. And, what is that figure?

A. Five Million Three Hundred and Fifty Eight Thousand Five Hundred and Sixteen Dollars.

Q. And, the next entry is the same figure in the Total Taxable Property Column?

A. Yes, sir.

Q. And then, what does the total Tax Column show?

A. Sixty Four Thousand Three Hundred and Two Dollars and Nineteen Cents.

[fol. 270] Q. Have those taxes been paid?

A. No, sir.

#### OFFER IN EVIDENCE

Mr. Langley: We want to offer in evidence this assessment sheet, Defendant's Exhibit Number Two.

## DEFENDANT'S EXHIBIT NUMBER TWO

# ADDITIONAL INVENTORY OF PROPERTY DUMAS INDEPENDENT SCHOOL DISTRICT

Owner Phillips Chemical Company

Address Box 1751, Amarillo, Texas and rendered to assessment of Taxes for the year 1955 by .....  
 ..... to Jno. R. Powell, Assessor of Dumas  
 Independent School District, Moore County, State of  
 Texas.

All of the following described realty, commonly known as Cactus Ordnance Works, including buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to-wit:

## CLERK'S NOTE

"Here follows approximately ten pages of legal descriptions of seven tracts of land and twenty-three easement areas, being identical to the descriptions found in the lease from the United States of America, beginning at page 76 of this record with the words 'That part of sections ... and ending at page 86 of said record with the word ... of the N.E. corner thereof.'"

[fol. 282]	Total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging (except that wholly owned by Phillips Chemical Company)	\$10,000,000.00
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(If unrendered, Assessor will fill this Certificate)

I, Homer Foreman, Assessor and Collector of Dumas Independent School District, do hereby certify that this

inventory contains a true and correct list of property subject to taxation in this district for the year or years designated, known as the property of Phillips Chemical Company (Cactus Ordnance Works) (if owner is unknown, say unknown) which property has not been listed to me for assessment for the year or years designated, and I hereby assess said property for the year or years 1955 in compliance with the laws regulating the assessment of unrendered property.

Jno. R. Powell, Assessor and  
Collector Dumas Independent School District

By (s) Ovelle Cagle, Deputy.

(SEAL)

[fol. 283] Mr. Langley: That is all.

Redirect examination.

By Mr. Blume:

Q. Do you know when this assessment was made?

A. When it was made?

Q. Yes, sir?

A. No, I wouldn't know the exact date.

Q. Would you know the approximate date?

A. No.

Q. You would not know even approximately?

A. Just whenever we come to it, when we are making up the inventory sheets.

Mr. Blume: No more questions.

Mr. Langley: No further questions.

(Witness excused).

CARL TROUTMAN, a witness called to the witness stand by Counsel for the plaintiff, being duly sworn, testified on his oath, as follows:

Direct examination.

By Mr. Blume:

Q. Would you state your name, please?

A. Carl Troutman.

Q. Are you a member of the Board of Trustees of the Dumas Independent School District?

A. Yes, sir.

[fol. 284] Q. Were you in 1954 on the Board of Equalization of the Dumas Independent School District?

A. Yes, sir.

Q. Do you recall participating in a hearing on or about August 9, 1954, considering assessments made on realty commonly known as the Cactus Ordnance Works; do you recall participation in that hearing?

A. Yes, sir.

Q. Did the Board of Equalization consider and equalize valuations on property described in these assessments, shown as Exhibit Number Three?

A. I am not acquainted with those section numbers.

Q. Well, it has been testified to by Mr. Powell that he prepared these assessments, so disregard any question of comparison as to the land description and things of that sort. I want to know if this is the property you considered in the Board of Equalization hearing and the property you equalized?

A. I would say it was.

Q. And, do you recall any changes being made on such assessments at the Board of Equalization meeting?

A. Yes, I believe there were.

Q. Do you recall what the changes were?

A. No, I don't.

Q. I will show you Defendant's Exhibit Number One on [fol. 285] which is indicated a change from "Phillips Petroleum Company" to "Phillips Chemical Company", the insertion of additional language at the bottom of the last



attached sheet of descriptions and the changed valuation. Were such changes made by the Board?

A. The figures was authorized by the Board.

Q. How about the other changes in the language?

A. Well, I don't recall who made that change from Phillips Petroleum Company to Phillips Chemical.

Q. You don't recall who added the language "Except that wholly owned by Phillips Chemical Company"?

A. It was the Board who authorized whoever put it down there.

Q. The Board authorized and directed both of those changes. Is that your testimony?

A. Yes, sir.

Mr. Blume: That is all.

Mr. Langley: No questions.

(Witness excused).

GEORGE MURPHY, a witness called to the witness stand by Counsel for the Plaintiff, being duly sworn, testified on his oath, as follows:

Direct examination.

By Mr. Blume:

Q. Will you state your name, please?

A. George Murphy.

[fol. 286.] Q. Were you, during the year 1954, a member of the Board of Equalization of the Dumas Independent School District?

A. Yes, sir, I was.

Q. Did you participate in a hearing on or about August 9, 1954, in regard to assessments made against the property commonly referred to as Cactus Ordnance Works?

A. Yes, sir.

Q. I will ask you to examine Plaintiff's Exhibit Number Three, consisting of copies of assessments of renditions and I will ask you if at that Board of Equalization meeting you considered and equalized the value on the prop

erty therein described for the years 1949 through 1954, inclusive?

A. I believe the answer to that question is yes. We did consider all of the property brought before the Board for valuation.

Q. And, you reduced valuation on the property described there from the given figure of Ten Million Dollars to some other figure for each of the years in question, did you not?

A. I believe that is correct.

Q. I will hand you Defendant's Exhibit Number One and ask you to note some changes on that exhibit in red pencil and also tell you that somewhat similar changes were made for each of the other years and I will ask you if you know who made those changes?

A. As to who did the actual writing, I do not. We authorized the change.

Q. You directed that it be done?

A. Yes, sir.

Q. By "we", you mean the Board of Equalization?

A. Yes, sir, that is right.

Q. When you directed the addition of language, "Except that wholly owned by Phillips Chemical Company", you wanted to exclude any property owned by Phillips Chemical Company?

Mr. Thomas: We object to that question for the reason that it calls for a conclusion of the witness. The instrument speaks for itself. It is not subject to interpretation by this witness or any other witness.

The Court: Sustain the objection.

Mr. Blume: No more questions.

Mr. Langley: No questions.

(Witness excused).

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Blume: I would like next to introduce an admission against the defendant, a statement contained in a brief submitted by the defendant, as follows: "The defendant of course, disagrees with this view of the case and feels that it has levied a valid tax against the plaintiff on a

property right owned by the plaintiff in and to property owned by the United States and leased to the plaintiff and that the tax is against the leasehold interest of the [fol. 288] plaintiff, even though the assessment is levied upon a value which is measured by the value of the fee interest in the property." That statement is contained in a brief signed by Earnest L. Langley.

Mr. Langley: May it please the Court, we object to the introduction of that in evidence for the reason that it is not an admission in the first place because it does not say that the tax is levied upon that interest or upon that value. Rather, it says that the tax is against the leasehold interest of the plaintiff even though it is levied upon a value which is measured by the fee interest of the property and could be interpreted to mean that no matter what value is placed upon it and even though it is about value as to the fee interest it is, nevertheless, levied against the leasehold interest of the plaintiff and that is all that is admitted. Also, we might say that we assume that opposing counsel will admit and stipulate, by offering this in evidence, that we have indeed levied only on the leasehold interest of the plaintiff.

Mr. Blume: We are not so stipulating.

Mr. Langley: We are not objecting to that portion of it that you have offered stating that it is levied against the leasehold interest only and you have offered that in evidence.

[fol. 289] Mr. Blume: We offer the whole thing and we particularly offer that portion.

The Court: What is it worth?

Mr. Blume: I think it is an admission that the tax was levied on the entire fee interest and that was their theory and that is what they did.

The Court: That isn't what it says.

Mr. Blume: It says that the assessment is levied upon a value which is measured by a fee interest in the property.

Mr. Langley: We object for the further reason that it is immaterial and irrelevant to this inquiry when the issue before the Court has nothing to do with valuation levied against the leasehold interest of the plaintiff in the

property and the question is not before the Court as to what value was placed on it or how they attempted to arrive at a value. The only question is whether or not it was taxable and, if it was levied against the leasehold interest, then that question is reserved for a later trial.

The Court: Sustain the objection.

Mr. Blume: I would like to next offer in evidence portions of a superseded pleading of the defendant, that is portions of the Original Cross Action of the Defendant Dumas Independent School District, and would like to [fol. 290] introduce Paragraphs 11, 12, 13, 14, 15, 16 and 17, which are introduced for the purpose of showing that the defendant taxed and valued the fee interest as so stated therein.

Mr. Langley: Your Honor, we object to the offering of that in evidence for several reasons: First, because it is irrelevant and immaterial; second, because it constitutes a taking out of context a part only of a pleading which should not be considered without considering also Paragraph 7 of that same pleading and cross-action, wherein it is stated that the Cross-plaintiff would show the Court that the property hereinafter set out and described is property owned in fee simple by the United States of America and the same is leased by the United States of America to Cross-Plaintiff, Phillips Chemical Company, and so forth; and, Paragraph 8 which recites that the property is taxable under one or the other or more of the following statutes, and so forth, all of which, taken together, indicates that there were not attempts made to assess the fee interest in this property to someone who was not the owner of it, which is the apparent and patent purpose of this pleading in evidence.

Mr. Blume: You can introduce that part if you think it is relevant.

[fol. 291] The Court: Isn't it true that the pleading filed in the case is as much a part of the record as any other?

Mr. Blume: It is my understanding that superseded pleadings are not a part of the record unless introduced.

The Court: I will sustain the objection.

Mr. Blume: Note our exception.

[fol. 311]

STIPULATIONS RE  
PHILLIPS CHEMICAL COMPANY

Mr. Blume: I will ask the Attorneys for the defendant if they won't stipulate that Phillips Chemical Company has been since July 30, 1948, and still is, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware, and having a permit [fol. 312] to do business in the State of Texas.

Mr. Langley: We will so stipulate.

Mr. Blume: Also That Phillips Chemical Company from August 16, 1948 to the present time has operated within the Dumas Independent School District a plant for the production of ammonia and/or nitric acid, which is commonly referred to as the Cactus Plant or the Cactus Ordnance Works?

Mr. Langley: We will stipulate that.

Mr. Blume: Will you further stipulate that the Phillips Chemical Company is a wholly owned subsidiary of Phillips Petroleum Company?

Mr. Langley: We will so stipulate.

Mr. Blume: I would like to introduce Request Number Three which reads: "That the defendants ~~have assessed~~ or attempted to assess for the years 1949 to 1954, inclusive, against Phillips Chemical Company the property described in Paragraph 7 of Plaintiff's Original Petition filed in this cause", and the answer thereto, "Admitted." I introduce Request Number Seven which reads: "That the United States of America owns the property upon which the defendants seek to collect taxes from the plaintiff as described in Paragraph 7 of Plaintiff's Original Petition, and that the United States of America has owned such property [fol. 313] during all of the years 1949 to 1954, inclusive." The answer is: "It is the understanding of the defendants that the United States of America does own the property referred to in Request Number Seven, although it should be noted that some of such land is owned in fee while other tracts of such land are owned by easement only and, further, the defendants say that there is some question as to the exact extent of the ownership of the United States of America in both the land so referred to and in certain improvements and buildings and equipment erected on

said land, it being the understanding of the defendants that the plaintiff is the owner of some of such improvements, buildings and equipment and, further, the matter of ownership of a multi-million dollar plant being a matter of such complexity and the defendants not being in possession of full information concerning such ownership the said defendants state that they are unable to admit or deny Request Number Seven."

Mr. Langley: If the Court please, I think that answer in itself shows that it is inadmissible by virtue of the fact that the defendant was unable to admit or deny Number Seven. We move that it be stricken.

Mr. Blume: I think the answer goes only to your knowledge of ownership that you have admitted and not to the question of what was taxed and that it is an admission [fol. 314] that you taxed the property described in Paragraph Seven.

The Court: Well, it would seem to me that whatever the answer is that it is admissible; what it may be worth is something else.

Mr. Thomas: I thought it was already stipulated that the United States Government owned the property subject to the leasehold interest of Phillips Chemical and it seems to me that we are just burdening the record by repetition.

The Court: Overrule the objection.

Mr. Langley: Exception.

Mr. Blume: I would like next to introduce Paragraph Number Seven of the Plaintiff's Original Petition for the purposes of identification of the subject matter of those admissions.

Mr. Langley: We will stipulate with you for the purpose of avoiding the introduction of five or six pages in the record that the property described in the Requests for Admissions is the same property described in the pleadings of the parties and in the assessment lists and so forth that are before the court.

Mr. Blume: I will withdraw my offer then of Paragraph Number Seven of the Plaintiff's Petition.

Mr. Langley: However, Mr. Blume, I might also say [fol. 315] at this time that that stipulation and admission



is with regard to the legal description set out in those various places and is not a stipulation with regard to ownership interest or leasehold interest or otherwise. It is just a matter of the fact that in your said Paragraph Number Seven you have a legal description of certain properties. Those same properties referred to in that Request for Admissions are the same property descriptions set out in your pleadings and in our pleadings and in the assessment sheets. I believe, for example, it does not state in your pleading that it is the property except that wholly owned by Phillips Chemical Company. That is not stated in your pleadings nor in the Requests for Admissions but it is stated in the assignment sheets. There are about five pages of legal description which we need not burden the record with another time.

Mr. Blume: I think we might refer to it by means of the current pleading, which is our amended petition, and stipulate that it is the same property described in Paragraph 6 thereof.

Mr. Langley: All right.

Mr. Blume: We are ready to close, your Honor.

Mr. Langley: Let the record show that the defendant called this witness as an adverse witness, as an agent and [fol. 316] employee of the plaintiff for the purpose of cross examination.

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CLAY CARRITHERS, a witness called to the witness stand by Counsel for the defendant, being duly sworn, testified on his oath, as follows:

Direct examination.

By Mr. Langley:

Q. Please state your name?

A. Clay Carrithers.

Q. And, where do you live?

A. Amarillo, Texas.

Q. You are an employee of Phillips Chemical Company, are you not?

A. I am.

Q. And, likewise, of Phillips Petroleum Company?

A. I am.

Q. And, what is your official position with those companies, sir?

A. My official title is Division Manager of the Tax, Insurance and Claims Department.

Q. Your offices are in the other offices of Phillips Petroleum Company in the First National Bank Building in Amarillo?

A. That is right.

Q. How long have you been in that position, Mr. Carrithers?

A. Since September of 1950.

[fol. 317] Q. And, you were so acting then during the year 1954 and all of such year?

A. Yes, sir.

Q. Now, I ask you whether or not prior to, say, the summer of 1954, either Mr. Thomas or Mr. Witherspoon or myself some members of our law firm down at Hereford corresponded with you by an exchange of several letters with regard to the possible taxability of the Cactus Ordnance Works to Phillips Petroleum or Chemical Company?

A. As I recall, I think there was possibly one letter that we received. I am not sure about that. However, I do recall that Mr. Thomas and Mr. Phillips called at our office in Amarillo relative to that matter sometime in 1954; the exact date, I can't remember.

Q. Was Mr. Powell with Mr. Thomas on at least one occasion?

A. No, sir.

Q. You mentioned a man by the name of Phillips?

A. Yes, sir.

Q. Who was that?

A. I understand he was an employee of John R. Powell and a Deputy Collector of the Dumas Independent School district tax office.

Mr. Langley: Will you mark, please, Mr. Reporter, these four instruments.

(Received and marked, "Defendant's Exhibits Numbers [fol. 318] Three, Four, Five and Six").

By Mr. Langley:

Q. Mr. Carrithers, I hand you here Defendant's Exhibits Numbers Three, Four, Five and Six, and ask you if those are not four letters written by you and addressed either to a member of our law firm or to the Dumas Independent School District in each case?

A. They are, sir.

Q. And, in the letter marked Defendant's Exhibit Number Three would you just please read that letter, please?

Mr. Blume: May I see them?

By Mr. Langley:

Q. Would you just read that letter, please, sir - number three?

Mr. Blume: I do have some objections to the relevancy of some of those. I suppose I will have to let you read it and I will see.

A. This letter is dated January 11, 1954, addressed to James W. Witherspoon, Attorney at law, Hereford, Texas, and reads as follows: "Dear Sir: Prior to receiving your letter of December 31, 1953, you were advised that we would be glad to discuss with you your prior request concerning a proposed assessment at the Cactus Plant. We had hoped to determine by such conference what it is you wanted. Are we to assume that you are seeking the detail of the properties owned by the United States Army? If so, we will pass your request along to the Secretary of the Army to [fol. 319] determine whether he is disposed to comply or will permit us to comply. If it is the properties of the Phillips Company you are concerned with, you are advised that the Public Records will disclose that they were rendered, assessed and taxed, taxes paid thereon, for all years to and including the year of 1953. For the year 1954, we will render this property at the proper time and disclose any information sought by any duly organized official of any subdivision of the State of Texas authorized by law to assess taxes." Signed Very truly yours, and signed by me.

Q. In writing that letter, is it not true that you were doing that in response to letters from our office requesting you to render for taxation purposes the interest of the Phillips Companies in the Cactus Plant?

A. Well, I think that bears up, to my thinking perfectly clear, in that, I was trying to seek at the moment--just what it was you wanted and, in response to your question, I think that I said in that letter that if it is the property of the Phillips Companies that you want we feel that we have rendered for the past years and that we would do so for 1954. I can't recall definitely whether it was a telephone call or a call from Mr. Thomas or someone else leading up to that but, at that particular juncture, we were clearly or I was clearly trying to find out what you were seeking in order that I would be able to answer your question [fol. 329] intelligently.

Q. Did you find out at a later time what we were seeking?

A. Yes, sir.

Q. And, what was that?

A. That you and your attorneys wanted us to make a rendition for all of the property commonly known as the Cactus Plant, irrespective of whether it was under lease to Phillips Petroleum Company or operated by Phillips for the Government.

Q. And, did we not tell you at one time or another, and perhaps more than one time, that it was our contention that your interest in the property as Lessee was taxable?

A. That is right, sir.

Q. And, you know and understood with us, as attorneys for the School District, at all relevant times here, from and after this letter at least, that we were not making any contention that you had not paid your taxes on your wholly owned property but that we were contending that taxes were due by you on properties, the title of which was in the United States; you knew that, did you not?

A. State that question again, please, sir.

Q. From and shortly after this letter was written, it came to be understood between yourself and our law firm, as representative of the school district, that we were not attempting to levy or assess any more taxes on your wholly

owned property but rather on some interest owned by you [fol. 321] in property the fee title of which was in the United States?

Mr. Blume: I don't believe that is a proper question, Your Honor. It calls for him to state what the understanding was of both parties. I object to the question.

Mr. Langley: Let the question be withdrawn.

By Mr. Langley:

Q. Did we, as attorneys for the School District, or did the School District or Tax Assessor or anyone else connected with the School District, ever demand that you render that property for taxation as the fee simple owner of it?

A. State that question again, Please, Mr. Langley.

Mr. Langley: Let me ask the Reporter to read it.

(The Reporter read the last question asked.)

A. No, sir.

Q. You knew and understood and we knew and understood all along that you were a Lessee merely; isn't that correct?

A. Well, I wouldn't say that I knew that all the time; no, sir.

Q. From and after the time of this letter?

A. I would say that I knew that at the time of the Board of Equalization.

Mr. Blume: I must make the same objection to that; calling for him to state what he understood you to understand, something of that nature, was it not?

[fol. 322] Mr. Langley: If the Court, please, I think I am asking him for a conclusion, all right, of his understanding but we can get at it by a little more drawn out method. That is a shorthand rendition but I can ask him what he understands from his conversations and contact with the school district and its attorneys.

The Court: Overrule the objection.

Mr. Langley: It is relevant, Your Honor.

The Court: I have overruled the objection.

By Mr. Langley:

Q. You knew all along here, at least by the time of the Equalization Board Hearing and by the time you were getting assessment sheets and so forth, that we understood and that the school district knew that you were not the fee owner of the property?

A. Yes, sir. I would say that is clear.

Q. And, you knew we were not attempting to assess you as a fee owner but just your interest in the property. What ever that interest was?

A. Yes, sir.

Q. And, you weren't misled by the assessment sheets, were you, Mr. Carrithers?

A. Well, I would say that the assessment sheets were not particularly clear and I think it was okay about the time that the Board of Equalization met that it was crystallized as to what you were driving at.

101-323 Q. To your knowledge, have you as attorneys, or has anyone else connected with the School district, ever denied that the Government was the fee simple owner of the property?

A. Not to my knowledge.

Q. Subject to the leasehold interest of the Phillips Chemical Company or Phillips Petroleum Company?

A. That is my understanding.

Q. And, it was your understanding that we knew about the existence of that lease?

A. Yes, sir.

Q. Now, you appeared before the Board of Equalization, did you, yourself?

A. Well, I was there, yes, sir.

Q. And, is it not true that you informed the Board of Equalization of the School District in 1954, in August or September, that Phillips Petroleum Company did not own the leasehold but that it was owned by Phillips Chemical?

A. I did not, personally; no.

Q. You didn't personally so inform them?

A. No.

Q. I ask you whether or not, by letter, dated July 12, 1954, you informed the Dunals Independent School District



that the Phillips Petroleum Company didn't own the property identified in the assessment?

A. If you are referring to a letter in your hand, may I [fol. 324] see it, please, sir? This is referring to your identified Exhibit Number Five. In answer to your question, I believe the rendition sheets presented to me by Mr. Phillips and Mr. Thomas or sent to me from them assessed the property in the name of Phillips Petroleum Company and that this letter here, Second paragraph, refers directly to that; that the assessment as made is erroneous; that Phillips Chemical Company is the lessee.

Q. And, that correction was made by the Board of Equalization before the taxes were placed on the tax rolls?

A. As far as the record is concerned, I understand it has; yes.

Q. That was the only correction that you asked to be made in the assessment sheets or in the rolls of the description of the property or any way connected with it?

A. That letter, Exhibit Number Five, is explanatory as far as I am concerned personally.

Q. Did you ever personally ask the School District or its attorneys or Board of Equalization, or Tax Assessor to make any other corrections in the property description?

A. I did not personally; no.

Q. Do you know of your own knowledge whether anyone else connected with Phillips Petroleum Company or Phillips Chemical Company ever made any such further request?

A. I would have to study that thought further. I just [fol. 325] don't know at this moment.

Q. You don't know of anybody who ever did?

A. I don't know all of the details that took place at the Board of Equalization.

Q. I am just asking you whether you know of your own knowledge?

A. I don't of my own knowledge; no.

Mr. Landley: That is all.

Cross examination.

By Mr. Boyd:

Q. Mr. Carrithers, was it your understanding that the School District was attempting to value the property at full fee value?

Mr. Thomas: We are going to object to his understanding of what the Board of Equalization did. It is a conclusion of the witness. It is irrelevant and immaterial.

Mr. Boyd: I believe, in that connection, we have had a number of objections put to the questions asked this witness which called for his conclusions as to what his impression of what the Board and the attorneys for the Board and the attorneys for the School District were trying to do and those objections were overruled and we are simply following that line of examination to develop what his understanding of what their position was to get a full explanation [fol. 326] of it and of his understanding of their position.

The Court: Merely because a witness is allowed to testify to some conclusions doesn't make all of them legal.

Mr. Boyd: I understand that but as I understood from the question and answer a moment ago they asked if it was the understanding of this witness that the school district and the attorneys for the school district and the school board were attempting to assess to Phillips only the leasehold estate in that property and he said that that was his understanding of what their position was. Now, I want to follow that by asking him did he also understand their position to be that they were that they felt, under law, that they could assess the Cactus Ordinance Works to Phillips at its full fee value the same as if Phillips owned it.

Mr. Thomas: May it please the Court, in the first place, the most that could be said of that, even if it were admissible, would be to go to the question of whether the value placed by the Board of Equalization was excessive and I thought we were not trying that issue today and, secondly, the prior questions asked Mr. Carrithers as to whether or not he understood and whether or not Phillips Chemical understood the assessments went to this one [fol. 327] particular point if it was not clear to them that

the law imposes an obligation upon the taxpayer to go to the Board and ask that it be clarified. We were attempting to show and did show by this witness, that there was no confusion in the minds of this taxpayer as to what interest was being assessed. We didn't go into the value question and didn't ask for any conclusions from him in that connection.

The Court: I will sustain the objections; but, if you want to put in the record what his answer is, you may do so.

By Mr. Boyd:

Q. I will ask you then this question; as to whether or not it was your understanding that the school district or the attorneys for the school district or the Board of Equalization felt that they could assess the Cactus Ordnance Works to Phillips at its full fee value, the same as if Phillips Chemical Company owned it; was it your understanding that that was their position?

A. Read that question—state that question back to me again.

(The Reporter read the last question asked.)

A. Well, I didn't believe that they were attempting to assess it as a fee property but they were attempting to assess it on the basis of Phillips Chemical Company as a Lessee.

Q. Was it your understanding that they were assessing [fol. 328] the leasehold estate of Phillips Chemical Company; is it your understanding that that is what they described on this rendition sheet?

A. It was my understanding that they were attempting to assess the interest that Phillips had as a lessee.

Q. What value did they put on it—did they put the leasehold value or the fee value?

A. I do not know whether or not there was two values or not; whether in their minds there was a fee value and a leasehold value.

Q. Which value did you feel that they discussed at the Board of Equalization, the fee value or leasehold value?

Mr. Thomas: It is not a question of what Mr. Carrithers felt or what his inclinations were and I object to the question as being improper and irrelevant and immaterial.

The Court: I sustain the objection.

By Mr. Boyd:

Q: I will ask you this then: That when you denied liability did you feel that there was any need to ask for any correction of the assessments or tax rolls, if you considered that there were any errors in the same?

The Court: Did you understand his question?

A: Well, again, I get back to my statement that I wasn't present at the full hearing of the Board of Equalization so I can't speak of my own knowledge of what transpired [fol. 329] there. I think that until after the Board of Equalization hearing, and the knowledge I had, that there were a lot of clarifications as far as the renditions that were delivered to me by either Mr. Thomas or Mr. Phillips as to the property described on there.

Q: What clarification do you have in mind there?

A: Well, I think that I wanted to know what they were assessing or attempting to assess other than a fee.

Q: So, if you had not taken the position of denying liability, then, you would have inquired as to what property they were attempting to assess there other than the fee?

A: I would have.

Mr. Thomas: We object to that question as being leading and ask that it be stricken.

The Court: I sustain the objection.

By Mr. Boyd:

Q: I will ask you this then. Is it a fact that you denied liability?

A: Yes, sir.

Q: And, if you had not denied liability, would you have questioned anything about the statement or tax rolls or assessments?

A: Yes, sir.

Mr. Thomas: We are going to object to that as being irrelevant and immaterial. He said he denied liability and what he would have done if he hadn't have denied liability [fol. 330] has nothing to do with any issue.

The Court: Sustain the objection.

Mr. Thomas: And, ask that the question and answer be stricken.

Mr. Boyd: Was that question and answer stricken?

The Court: Yes, sir.

By Mr. Boyd:

Q. At the beginning of your testimony I think you testified that a fellow by the name of Phillips came with Mr. Thomas to your office and it was your opinion that he was a Deputy Tax Assessor-Collector for the Dumas Independent School District. Did you know as a matter of fact if he was or was not a Deputy Tax Assessor of the Dumas Independent School District?

A. I wasn't real certain at that time; no.

Q. Do you know as a matter of fact whether or not he was a deputy?

A. He was.

Q. On what do you base that knowledge?

A. He represented himself as being a deputy in Mr. Powell's office when he was in the presence of Mr. Thomas and, subsequent to that, I saw him in Mr. Powell's office. I don't know how many days later but through personal observation and contact with Mr. Powell I determined that he was employed by Mr. Powell in that capacity.

Q. Did you determine that he was employed as a clerk or as a deputy?

[fol. 331] A. Well, I frankly don't know the distinction between a deputy and a clerk. I know he was an employee of the tax office and I know he was under the supervision of Mr. Powell.

Q. Do you know if he made any bond or had taken any oath as a deputy?

A. No, sir.

Q. Do you know what the qualifications of a deputy are?

A. No, sir.

Q. As a matter of fact then, you don't know if he was a deputy or not?

A. No, sir.

Mr. Thomas: This is an attempt on the part of plaintiff to impeach his own witness and the witness testified he was a deputy and I don't see what difference it makes for them to keep laboring the point if he is or not.

The Court: I don't see the materiality of it.

Mr. Boyd: That is all.

Mr. Langley: No more questions.

(Witness excused.)

#### STIPULATIONS RE BOARD OF EQUALIZATION

Mr. Langley: We will ask Counsel for the Plaintiff if they will stipulate at this time that the Board of Equalization of the Dumas Independent School District, which convened about August 9, 1954, was a duly constituted Board [fol. 332] of Equalization; that it convened at the time and in the manner provided by law and that the plaintiff appeared before that Board in the time and manner provided by law; that the Board was legally appointed, constituted and acting at that time.

Mr. Blume: I don't see the relevancy of it to this severed cause.

Mr. Langley: We want that stipulated for the purpose of showing that there will be no question raised as to the validity of the action of the Board in acting on those assessment sheets, approving them and placing them on the tax rolls and the tax rolls having been approved and the valuations approved by the Board and so forth. I was reading practically verbatim from Paragraph 4 of the second cause of action alleged in your First Amended Original Petition. If you do not care to stipulate to that, I can introduce that pleading in evidence.

Mr. Blume: I would be glad to stipulate but I still don't see the relevancy of it since we are not going into values at this time. We have called them and they have all testified that they were members of the Board of Equalization.

Mr. Langley: You have placed in issue by argument and testimony during the course of this proceeding today the



[fol. 333] question of the validity of these assessment sheets and the validity of the assessments and tax rolls.

Mr. Blume: We will stipulate that subject to our not seeing the relevancy of it that Mr. Foreman, Mr. Troutman and Mr. Murphy were duly elected and appointed members of the Board of Equalization and that we did appear before them on or about August 9, 1954. Is that the substance of your request?

Mr. Langley: And, that they were a legally appointed, constituted and acting Board of Equalization at that time?

Mr. Blume: Yes, we will stipulate that.

Mr. Langley: And, in the time and manner provided by law the plaintiff appeared before that Board on or about August 9, 1954?

Mr. Blume: All right. We will stipulate to that.

Mr. Langley: We will rest, your Honor.

Hayward C. Marsh, a witness called to the witness stand by Counsel for Plaintiff, in rebuttal, being duly sworn, testified on his oath, as follows:

#### Direct examination.

By Mr. Blume:

Q. Will you state your name, please?

[fol. 334] A. Hayward C. Marsh.

Q. Where do you reside?

A. Bartlesville, Oklahoma.

Q. By whom are you employed?

A. Phillips Petroleum Company.

Q. In what capacity?

A. Assistant Manager of the Tax, Insurance and Claims Department.

Q. Does your department handle tax matters also for Phillips Chemical Company?

A. Yes, sir.

Q. Are you a superior of Mr. Clay Carrithers?

A. Administrative superior; yes, sir.

Q. Who primarily handled the matter of the attempted

taxation of the Cactus Ordnance Works, yourself or Mr. Carrithers?

A. It was my responsibility.

Q. Did you appear at the Board of Equalization during the entire proceeding?

A. Yes, sir.

Q. Mr. Carrithers was there only a portion of the time; isn't that correct?

A. That is right.

Q. Was all of the correspondence received by Mr. Carrithers and the import of all of his conversations with the attorneys for the school district transmitted to you as far as you know?

[fol. 335] A. As far as I know.

Q. Did you more or less supervise and direct the presentation of the matter which was presented to the Board of Equalization in regard to Cactus Ordnance Works?

A. I had basic supervision of the responsibility of assembling facts and witnesses; not the actual presentation of the case.

Q. Did you have a clear understanding as to what the Dumas Independent School District was attempting to tax?

A. It was clear to me what the actions taken by the Board were intended to tax.

Q. What did they indicate to you?

A. Indicated to me the full fee title to the property known as Cactus Ordnance Works.

Mr. Langley: If it please the Court, we object to that question and answer, particularly to the answer, unless this witness will take himself out of the realm of shorthand rendition of his understanding by saying upon what he based his understanding that they were attempting to assess the fee simple title and explain why it is that he so believes.

The Court: Sustain the objection.

By Mr. Blume:

Q. Will you then state

Mr. Langley: And, we ask that that answer be stricken. [fol. 336] The Court: All right.

By Mr. Blume:

Q. Will you state how you arrived at an understanding, if you arrived at one, of what the actions of the school district indicated they were attempting to tax?

A. The clear wording of the assessment that was made described real property.

Mr. Thomas: If this is going to be an interpretation of the assessment sheet, then we are going to object to it because that assessment speaks for itself and it is not for this witness to interpret—it is a conclusion.

Mr. Blume: On direct examination, the defendants brought into issue the understanding of these people and that is the issue; not an interpretation but the subject matter as to their understanding.

Mr. Langley: On that issue, Mr. Carrithers was asked essentially one question and that was pitched in several different fashions but he was asked if he understood throughout all of this thing that the School Board knew that Phillips Petroleum Company or Phillips Chemical Company didn't own the fee simple title and he said he knew and understood that. That is as far as his understanding was inquired into and they want to ask Mr. Marsh if he knew and understood that the School Board knew and understood that Phillips Chemical Company and Phillips [fol. 337] Petroleum Company didn't own the fee simple title to this property. That is all right; we would ask Mr. Marsh the same thing; but, not his understanding of the way that the Board was operating and so forth.

The Court: I sustain the objection.

By Mr. Blume:

Q. Was any testimony prepared and presented to the Board concerning the value of the leasehold?

A. No, sir.

Q. Why was it not presented?

A. Because no attempt had been made to assess us as far as we knew.

Mr. Langley: Again, we object to that as being a conclusion of the witness, Your Honor.

The Court: Sustain the objection.

Mr. Langley: And, ask that that question and answer be stricken.

The Court: All right.

By Mr. Blume:

Q. Was all of the testimony presented to the Board of Equalization on behalf of Phillips Chemical Company or Phillips Petroleum Company directed to the fee value of the property?

A. Yes, sir.

Q. Was all of the testimony presented by the Board of Equalization directed toward the fee value of the property?

A. Yes, sir.

[fol. 338] Mr. Langley: Again, Your Honor, we say that that calls for a direct conclusion as to the applicability to a number of legal and factual questions of some two hundred and seventy five pages of testimony from some fifteen or twenty witnesses and that his opinion and conclusion as to what all of that testimony was directed to would be an improper judgment on the part of the witness and improper opinion testimony and we object to it and move that it be stricken.

The Court: I sustain the objection.

Mr. Blume: That is all we have.

Mr. Langley: No questions.

(Witness excused.)

Mr. Blume: We are through, Your Honor.

Mr. Langley: We are through.



Roll.....Page.....Line.....

DUE FROM

Phillips Chemical Co.  
Box 1751  
Amarillo, Texas

**DUMAS**  
**INDEPENDENT SCHOOL DISTRICT**  
DUMAS, MOORE COUNTY, TEXAS

**1954**  
**TAX STATEMENT**

**Nº 5962**

Statement of Taxes due for current year on following described property.

ABSTRACT OR LOT NO	CERTIFICATE TRACT OR BLOK	SURVEY DIVISION OR OUT LOT	ORIGINAL GRANTEE CITY OR TOWN	ACRES	VALUE	AMOUNT DUE
	2-5	Part 20,28, 29,36,37,38	(Cactus Ordinance Works) Including buildings, fixtures, machinery, improvements & appurtenances - located on described property	1538.31	5,358,516	
Personal Property Value						
Total					5,358,516	167,517.30
Plus Penalty & Interest						
Total Taxes Due						

No Discounts Allowed -- Penalty Attaches February 1.

Box 248

Jno. R. Powell  
Tax Assessor-Collector

By

WIS BENNETT & CO. AS



**No. 2708-A**

PHILLIPS CHEMICAL COMPANY, Plaintiff,

v.

**DUMAS INDEPENDENT SCHOOL DISTRICT, Defendant.**

## AGREEMENT OF PARTIES

The parties to the above entitled and numbered cause, through their attorneys of record, hereby agree that the above and foregoing pages numbered 2 to 424, inclusive, including the documentary evidence, maps, charts, and other papers and exhibits therein copied or reproduced, constitute the Statement of Facts in said cause and include a true and correct statement of all objections to the admission or exclusion of evidence, the rulings of the Court therein, and the circumstances thereof, and the exceptions of the parties, and the same may be filed as the Statement of Facts in this cause.

Witness our hands this, the 18th day of January, 1957.

**Thomas M. Blume, Attorney for Plaintiff.**

**Earnest L. Langley, Attorney for Defendant.**

[fol. 343] Reporter's Certificate to foregoing transcript  
omitted in printing.

The above and foregoing statement of facts having been examined by me and found correct, and having been certified to by the Official Court Reporter, the same is hereby approved and ordered filed as part of the record in this cause.

Witness my hand, on this the \_\_\_\_\_ day of \_\_\_\_\_  
A.D. 1957.

County, Texas. \_\_\_\_\_, District Judge, Moore

[fol. 344] Filed in Supreme Court of Texas, Jan. 6, 1958,  
Geo. H. Templin, Clerk. By .....  
Deputy.

[fol. 345]

IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME  
JUDICIAL DISTRICT OF TEXAS

A 6639

No. 6697

PHILLIPS CHEMICAL COMPANY, Appellant,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT OF MOORE COUNTY,  
TEXAS, Appellee.

OPINION—September 30, 1957

This appeal is from a trial court order denying appellant, Phillips Chemical Company, a corporation, injunctive relief in its attempt to restrain appellee, Dumas Independent School District of Moore County, Texas, from assessing and collecting property taxes from appellant for certain designated years on its leasehold interest in property known as "Cactus Ordnance Works" owned in fee simple by the United States Government but operated by appellant under a long term lease contract. The original lease contract was executed on July 23, 1948, effective August 16, 1948, between the United States Government and Phillips Petroleum Company, which assigned it to appellant herein on July 30, 1948. Appellant accepted all of its terms and assumed all of its covenants.

The trial court heard the case without a jury and, only in so far as the controlling question presented here is to be determined, denied appellant the relief sought. In its judgment the trial court found that the said property was not being used or occupied by the United States Government but was being used and occupied by appellant under the terms of the said lease contract in conducting and

operating a business as a private enterprise for profits during each of the years beginning with March 17, 1950 through the year 1954, the same being the period of time appellant alleges appellee is seeking the right to collect the [fol. 346] property taxes upon its leasehold interest previously mentioned.

In its alleged action appellant sought to enjoin appellee from assessing and attempting to collect taxes from it upon the property in question for the years 1949 through 1954, and sought further to cancel the taxes already assessed by appellee. Appellee joined issues with appellant and also filed a cross action seeking to collect taxes from appellant upon its interest in the property for the said years. Upon appellant's motion the trial court severed the question of injunctive relief from the remainder of the suit, including appellee's cross action, and tried only the issue of injunctive relief, after which it entered its order enjoining appellee from assessing and collecting taxes on appellant's interest in the property in question for 1949 and up to March 17, 1950, the date the last amendment to Art. 5248, V.A.C.S. became effective, but denying appellant the relief sought in an effort to enjoin the collection of taxes for the remainder of the period of time from March 17, 1950, through 1954. An appeal from the latter part of the trial court's judgment was perfected by appellant and that is the only question before us. Appellee, as a cross appellant, gave notice of appeal from the first part of the trial court's judgment granting appellant injunctive relief for 1949 and up to March 17, 1950, but appellee as a cross appellant did not bring forward its appeal from that part of the trial court's judgment.

The lease contract here involved is lengthy but under the terms thereof appellant herein accepted a binding lease agreement for the use and operation of a multimillion dollar industrial plant known as the "Cactus Ordnance Works" for its use in manufacturing anhydrous ammonia, or fertilizer, and for other commercial and experimental purposes. The said industrial plant consists of buildings, improvements, machinery and appurtenances thereto located [fol. 347] upon certain described lands in Moore County, Texas. The primary term of the said lease is for 15 years

beginning August 16, 1948, with the right and privilege of appellant herein to extend the primary term of the same for two additional periods of five years each, the consideration therefor being an annual rental of \$1,026,666.67 to be paid by appellant herein as lessee to the United States Government as lessor. The lease further provides for a termination of the same by the United States Government if desired and upon giving 30 days notice to lessee in case of a national emergency, but there is no showing that any such emergency ever existed and appellant herein has continuously occupied and used the property covered in the lease since the date it became effective.

Appellant herein concedes that it owns the said leasehold and has been occupying and using the premises and the property thereon as provided for under the terms of the lease "in its private capacity as a business enterprise in an effort to make a profit therefrom." Appellee contends that because of such ownership of the leasehold by appellant as lessee and because of its operations thereof for a profit, it should be required to pay a fair and equitable tax thereon in the same manner as other competitive private corporations or individuals engaged in a similar enterprise for profit, although the latter parties may own their plants in full. Appellant here charges that appellee is attempting to tax it on the fee simple title to real property with improvements thereon which property is not owned by appellant but is owned by the United States Government. Appellant further charges that it (sic) can not be legally taxed for property owned by the United States Government and not owned by appellant, while appellee asserts it is not seeking to tax appellant on property owned by the United States Government but it is seeking only to tax appellant on its [fol. 348] interest in the property in question by reason of its leasehold, its occupancy and operations of the same in a private capacity for profits as a business enterprise.

The lease contract between the Government as lessor and appellant herein as assignee and lessee recognizes the provisions of "Public Law 364 80th Congress," the leasing Act, codified in part at least in 19 U.S.C.A. 1270-1270d, which provides in part (1270d) that:

"The lessee's interest, made or created pursuant to the provisions of Sections 1270-1270b, 1270d of this title, shall be made subject to State or local taxation."

Under the terms of the lease contract between appellant herein and the Government, appellant obligated itself to pay the local taxes assessed against it by the approval of the language found as a part of the covenant in Condition (Section) 29 of the lease contract reading as follows:

"That the Lessee shall pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed, or imposed upon the Government or upon the Lessee with respect to or upon the Leased Property."

Article 5248 as amended, effective since March 17, 1950, previously herein referred to, authorizes appellee to impose a property tax upon appellant's interest in the property in question as a result of the leasehold since appellant admittedly occupies and uses the said property in conducting a private business or enterprise in an effort to make a profit therefrom. The language of the said Article is as follows:

"The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements [fol. 349] thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said lands which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."



We believe the foregoing provisions are clear, unambiguous and need not be explained.

Appellant contends here that the provisions of Art. 5248 violate the Constitution of the United States but no satisfactory authority has been cited in support of such a contention. In our opinion, the provisions of such Article support appellee's position before this Court and are in harmony with every reasonable construction that can be given the provisions of our Constitution, as well as the laws of our country.

Appellant cites and relies upon the case of *United States of America v. County of Allegheny, Penn.*, 322 U.S. 174, 64 S.Ct. 908, which case is distinguishable in many ways from the case at bar. That case arose in another State and involved a contract of bailment between the United States Government and an individual named Mesta "for mutual benefits" in the operations, which is not the situation in the case at bar. In that case the State as the taxing unit made no effort to segregate Mesta's interest and tax it, which is not analogous to the situation in the case at bar. We find no authority in that case which would be in any way controlling in the case at bar.

The case at bar does not involve the levying and assessment of a tax against the United States Government or [fol. 350] property owned by it but only against appellant as a private corporation and its exclusive interest under the terms of a leasehold agreement in occupying and using the property in its private capacity for a profit. Certainly appellant must have a valuable right in the use of lessor's property since it is paying the United States Government as lessor an annual rental of \$1,026,000.67 for the right to use such property. We have found no principles of law or equity, and appellant has cited us none, which can be reasonably construed so as to exempt appellant from paying such property tax as appellee is seeking in the primary suit to have appellant pay. On the contrary it seems that a reasonable interpretation of every element of the law fairly and justly requires appellant to pay its share of the taxes upon its privately owned leasehold under which it operates its private business enterprise in an effort to make a profit therefrom. We do



find the statutory authority previously herein cited, together with the provisions of Arts. 7146, 7173 and 7174, supporting the trial court's judgment denying appellant any relief, which in effect sustains appellee's efforts to hold appellant liable for its legal taxes.

In our opinion the language used in the leasehold contract and the Federal and State laws contemplate the payment of taxes by appellant upon its investment and the operation thereof shown to exist when such taxes are properly levied and assessed. The taxes cannot be legally assessed against appellant herein as lessee upon the value of the land and improvements thereon owned by the United States Government as lessor, but such can be legally assessed against appellant herein upon the value of its leasehold interest and its operations, with such to be determined as provided for by the Statutes.

For the reasons stated, appellant's points are all overruled and the judgment of the trial court is affirmed.

Pitts, C.J.

[fol. 351]

IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME  
JUDICIAL DISTRICT OF TEXAS

No. 6697

From the District Court of Moore County

Opinion by Mr. Pitts, C.J.

PHILLIPS CHEMICAL COMPANY, Appellant,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT OF MOORE COUNTY,  
Texas, Appellee.

JUDGMENT—September 30, 1957

This cause came on to be heard on the transcript of the record, and the same being inspected, and it appearing to the court that there was no error in the judgment, it is

therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Phillips Chemical Company, and its surety, United States Fidelity and Guaranty Company, a corporation, pay all costs in this behalf expended, for which let execution issue and this decision be certified below for observance.

[fol. 353]

A 6639

IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME  
JUDICIAL DISTRICT OF TEXAS AT AMARILLO, TEXAS

No. 6697

PHILLIPS CHEMICAL COMPANY, Appellant,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT, Appellee.

APPELLANT'S MOTION FOR REHEARING—

Filed October 14, 1957

[Omitted in printing]

[fol. 369]

REPLY OF DUMAS INDEPENDENT SCHOOL DISTRICT TO MOTION  
FOR REHEARING OF PHILLIPS CHEMICAL COMPANY—

Filed October 25, 1957

[Omitted in printing]

[fol. 384]

IN THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME  
JUDICIAL DISTRICT OF TEXAS

## OPINION ON MOTIONS OF BOTH PARTIES FOR REHEARING

The judgment of the trial court having sustained appellant's contentions in part and appellee's contentions in the remainder thereof and this Court having affirmed the trial court's judgment in its entirety, both parties have filed motions here for rehearing, and in each instance the adversary has ably replied thereto.

After a careful examination of appellant's motion and the reply thereto the same is overruled.

In its original opinion this Court said in part and in effect that, although appellee, as a cross appellant, gave notice of appeal from the first part of the trial court's judgment granting appellant injunctive relief from January 1, 1949 up to March 17, 1950, appellee, as a cross appellant, did not bring forward its appeal from that part of the trial court's judgment. It thus appeared then because of language used in its briefs by appellee subsequent to the filing of a separate brief as a cross appellant on March 2, 1957. Appellee thereafter on March 27, 1957, filed its brief as appellee in the case and there on page 4 said in part:

"Appellee here has appealed from that portion of the judgment of the Trial Court denying its right to recover taxes for the period prior to March 17, 1950, but for the purpose of this brief, only the question of taxability after such date will be considered."

It there devoted its entire brief of 55 pages to urging an affirmance to that part of the trial court's judgment denying relief from and after March 17, 1950, the date the amendment to Article 5248 became effective, and it did so without reference to overturning the former part of the trial court's judgment which favored appellant herein. Thereafter on September 17, 1957, after the case had been submitted and oral argument of the parties heard, appellee filed a reply brief consisting of 36 pages urging an

affirmance of the trial court's judgment and concluded with the following language:

[fol. 385] "For the above reasons, and in accordance with the above authorities, Appellee again prays the Court to affirm the Judgment of the Trial Court."

This Court did affirm the judgment of the trial court, feeling that appellee had by reason of the language more recently used abandoned its right of appeal, in any event, from the first part of the trial court's judgment.

However, after a careful re-examination of the record, the briefs filed and more particularly appellee's motion as a cross appellant urging us to pass on its cross assignment and sustain the same, we feel that the matter of passing on such should have a generous and liberal consideration by us, for which reason we likewise feel impelled to pass on the said cross assignment charging that the trial court erred in holding that appellant's leasehold was not subject to taxation from January 1, 1949 up to March 17, 1950.

As previously stated in our original opinion, we believe the language used in the leasehold contract and the Federal and State laws contemplate the payment of taxes by appellant upon its leasehold, but such could not be accomplished until a State law directly authorizing such had been passed. Property cannot be legally taxed merely by implication or by a "probable" construction of a statute. A direct act is required for such a purpose. We have failed to find any such authority taxing the property here involved until Art. 5248 was amended by the Texas Legislature which became effective March 17, 1950. The said amended Article was copied in full in our original opinion, which is here referred to for further consideration. All general laws governing taxation usually conclude with an exception such as: "... except as otherwise specially provided for by law." We think the matters here presented were "otherwise specially provided for by law" and no direct authority for taxing the leasehold in question was given until Art. 5248 was amended effective [fol. 386] March 17, 1950. Before Article 5248 was

amended, it did not authorize a leasehold such as the one here under consideration to be taxed by the State and its subdivisions. It did not prohibit such from being taxed but it did not authorize it. It did exempt such properties from taxation "so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title *and not otherwise*" (emphasis added). The phrase "and not otherwise" held the matter open for the taxation of a leasehold such as the one here under consideration if and when such statute may be amended directly authorizing such to be taxed, and we think such an amendment was passed by the Legislature for such a purpose effective March 17, 1950. Prior to the amendment a leasehold such as is here involved was exempt from taxation "so long as the property leased was "held, owned, used and occupied by the United States." But when the Article was amended by adding the provisions thereto, we think then and only then, notwithstanding ownership of the primary property by the United States, authority was given by the State Legislature to tax the leasehold here under consideration for the use and benefit of the State and its political subdivisions.

For these reasons appellee's cross assignment as a cross appellant is overruled and the judgment of the trial court is affirmed even as it was in our original opinion.

Pitts, C.J.

[fol. 387] Clerk's Certificate to foregoing papers omitted in printing.

[fol. 388]

IN THE COURT OF CIVIL APPEALS, SEVENTH JUDICIAL DISTRICT

8276 6697

From the District Court of Moore County.

Per Curiam with written opinion by Mr. Pitts, C.J.

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PHILLIPS CHEMICAL COMPANY,

vs.

DUMAS INDEPENDENT SCHOOL DIST. OF MOORE COUNTY, TEXAS.

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ORDERS ON MOTIONS FOR REHEARING — November 4, 1957

This day came on to be heard the appellee's motion for rehearing and the same, having been duly considered by the Court, is hereby in all things overruled.

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8277 6697

From the District Court of Moore County.

Per Curiam with written opinion by Mr. Pitts, C.J.

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PHILLIPS CHEMICAL COMPANY,

vs.

DUMAS INDEPENDENT SCHOOL DIST. OF MOORE COUNTY, TEXAS.

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This day came on to be heard the appellant's motion for rehearing and the same, having been duly considered by the Court, is hereby in all things overruled.

Clerk's Certificate to foregoing papers omitted in printing.



[fol. 389]

IN THE SUPREME COURT OF TEXAS

No. A-6639

PHILLIPS CHEMICAL COMPANY, Petitioner,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT, Respondent.

APPLICATION FOR WRIT OF ERROR FROM CAUSE NO. 6697 IN  
THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME  
JUDICIAL DISTRICT AT AMARILLO—Filed January 6, 1958

[Omitted in printing]

[fol. 486]

RESPONDENT'S REPLY TO APPLICATION FOR WRIT OF ERROR  
FROM CAUSE NO. 6697 IN THE COURT OF CIVIL APPEALS  
FOR THE SEVENTH SUPREME JUDICIAL DISTRICT AT AMA-  
RILLO—Filed January 21, 1958

[Omitted in printing]

[fol. 603]

IN THE SUPREME COURT OF TEXAS

No. A-6639

From Moore County, Seventh District.

PHILLIPS CHEMICAL COMPANY,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT.

ORDER GRANTING APPLICATIONS FOR WRITS OF ERROR—  
February 12, 1958

This day came on to be heard application of Phillips  
Chemical Company and application of Dumas Independent  
School District for writs of error to the Court of Civil

Appeals for the Seventh District, and, after due consideration, it is ordered that both of said applications be, and hereby are, granted and that writs of error issue as prayed for therein.

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[fol. 604]

IN THE SUPREME COURT OF TEXAS

No. A-6639

From Moore County, Seventh District.

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PHILLIPS CHEMICAL COMPANY, Petitioner,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT, Respondent.

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OPINION — June 18, 1958

Phillips Chemical Company, petitioner herein and plaintiff in the trial court, uses and occupies, as Lessee, a chemical plant owned by the United States Government known as "Cactus Ordnance Works" in Moore County, Texas. Phillips went into possession on August 16, 1948 under and by virtue of a lease contract between the Secretary of the Army, representing the United States of America, as Lessor, and Phillips Petroleum Company, as Lessee. The lease was for a primary term of 15 years with option on the part of Phillips Petroleum Company for renewal of two five year terms, and a further provision that any additional holding over would be on a year to year basis. The Government had certain options for termination of the lease after notice and happening of certain contingencies. This lease was immediately assigned by Phillips Petroleum Company to Phillips Chemical Company and the Chemical Company has operated the plant at all times since possession was taken under the lease.

The Government plant is located within the limits of Dumas Independent School District and that body has

sought to collect school taxes thereon for the years 1949 through 1954, inclusive. Chemical Company, as plaintiff in the trial court, brought this suit in the District Court of Moore County, Texas, to (1) enjoin the School District from attempting to collect ad valorem taxes from it on the "Cactus Ordnance Works"; and (2) to cancel the taxes on the tax rolls of the School District on said property for the years 1949 through 1954. The trial court [fol. 605] severed the question of the right to tax from the question of valuation, and upon trial before the court, without a jury, judgment was rendered cancelling all taxes through March 16, 1950, and permanently enjoining the collection of such taxes for such period upon either the property or the leasehold estate, but validated all taxes after such date and as to these taxes refused the relief sought. Chemical Company appealed and the Court of Civil Appeals affirmed the judgment of the trial court. 307 S.W. 2d 605. Each party applied for a writ of error and both applications were granted. We affirm the judgment of the courts below.

We first consider and discuss the application of the Chemical Company. It has assigned 13 points of error. These points attack the judgments of the courts below; first, on the basis that there exists no lawful authority authorizing taxation to the Chemical Company of either the Government-owned "Cactus Ordnance Works", or the leasehold estate therein; and, second, on the basis of whether the leasehold estate of the Chemical Company was assessed by the School District, as distinguished from the assessment of the property itself, or as a fee interest. After the end of World War II the United States Government had on hand a number of plants which it had constructed for the production of material and supplies needed to effectually wage that war. In order to keep these plants and equipment in working condition and available to the Government in case of another emergency it was decided, after careful study, to sell some of the plants to private operators with a "recapture" clause for the plants to be returned to the Government for a consideration; and to be operated by the purchaser solely under Government direction and control for the

exclusive use of the Government in the event of another war or the declaration of an emergency. Certain other plants and equipment, which included "Cactus Ordnance Works" were to be leased by the Government to private operators with like provisions for Government control and operation in the event of another war or existence of an emergency; also provision was made in the leases authorizing the delivery of possession to the purchaser [fol. 606] in the event the Government exercised its option to sell. Adequate legislation enabling the Government, through its proper officers, to make these sales or leases was passed by Congress. This plant was leased to the Chemical Company under the provisions of "Public Law 364—80th Congress", codified in part as 10 U. S. C. A. 1270, et seq. 1270d provides in part that, "the Lessee's interest, made or created pursuant to the provisions of Sections 1270-1270b, 1270d of this title, shall be made subject to State or local taxation \* \* \*." This Act was passed in 1948. This was a specific consent of Congress that such government property was subject to state or local taxation.

In the lease to this plant, the Chemical Company agreed "that the Lessee shall pay to the proper authority, when and as the same becomes due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed or imposed upon the Government or upon the Lessee with respect to or upon the Leased Property. \* \* \*." Thus we see the matter of local taxes was taken into consideration by both parties in arriving at the amount of rental to be paid to the Government by the Chemical Company for the use and occupation of "Cactus Ordnance Works."

The School District relied mainly upon Article 5248, Vernon's Annotated Texas Civil Statutes, as amended, effective March 17, 1950, to sustain the validity of their taxes. Chemical Company attacks this statute as being unconstitutional and void on a number of grounds. The principal ground is that such statute attempts to tax property belonging to the United States of America and is therefore unconstitutional. Prior to 1950, Article 5248 read:

"The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; [Federal Use] and such land and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise."

Article 7150, Section 4, Vernon's Annotated Texas Civil Statutes, provides an exemption from taxation of "all property whether real or personal, belonging exclusively to this State \* \* \*, or the United States, \* \* \*."

[fol. 607] The Legislature of the State of Texas being of the opinion that there were "no adequate provisions" for the taxation of the lands and improvements owned by the United States of America, which are used and occupied in the conduct of private businesses and enterprises by persons, firms, associations of persons, and corporations, and that funds badly needed by the State and its political subdivisions were being lost by reason of these properties escaping taxation, (amendment to Article 5248, Sec. 4, Acts 51st Leg., 1st C. S., p. 105, ch. 37, effective March 17, 1950) created an emergency and it amended Article 5248. There was added a proviso for the taxation of personal property belonging to the user and operator of these plants located on the lands owned by the Government and a further proviso " \* \* \* that any portion of said lands and improvements which is *used and occupied* by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions." The caption of the amended act specifically covers this part of the amendment. Section 2 of the Article is the severability clause and Section 3 repeals all laws and parts of law in conflict with the Act to the extent of the conflict.

In its application for writ of error, the Chemical Company admits that this language is clear and plain and could refer to nothing other than the property itself.



Further it says, "this Honorable Court would certainly be justified if not compelled to find, from the words of the second proviso, [the one immediately quoted above, that it is the entire property interest which the statute says shall be subject to taxation." This is followed by the contention that such construction of the statute would violate both the Constitution of the United States and of Texas. We agree that it was the intention of the Legislature [fol. 608] in amending Article 5218 to make the value of the entire property belonging to the United States Government, if *used and occupied by private business and operated for profit*, taxable to such user and operator. Article 8, Section 1 of our State Constitution provides for taxation of all property within the State in proportion to its value. Article 7145, Vernon's Annotated Texas Civil Statutes, is to the same effect. Article 7146, Vernon's Annotated Texas Civil Statutes, provides in part that "real property for the purposes of taxation, shall be construed to include the land itself, \* \* \* all buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all of the rights and privileges belonging or in anywise appertaining thereto \* \* \*."

"The rule is generally accepted in this State that all property rights acquired and held, and all contracts made, are subject to the authority of the State to levy its taxes and collect its revenues for the support of the government. State for Use of Delta County Levee Imp. Dist. No. 1 v. Bank of Mineral Wells, Texas, Civ. App., 251 S. W. 1107, writ refused; Preston v. Anderson County Levee Imp. Dist. No. 2, Tex. Civ. App., 261 S. W. 1077, writ refused; 9 Tex. Jur., pp. 549, 550, Sec. 114." State v. Wynne, 134 Tex. 455, 133 S.W. 2d 951, 956.

Article 8, Section 17, Constitution of the State of Texas, Vernon's Annotated, provides,

"The specification of the objects and subjects of taxation shall not deprive the Legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this Constitution."



Article 7150, Section 4, Vernon's Annotated Texas Civil Statutes, exempts from taxation property belonging *exclusively* to this State or the United States. With the Chemical Company operating and using "Cactus Ordnance Works", it ceases to belong exclusively to the United States. Whatever exemptions, if any, enjoyed by the United States Government-owned property in the hands of private business operators prior to March 17, 1950 were put to an end by virtue of the Acts of Congress, 1948 permitting state and local taxation, and the amendment of Article 5348 making this property subject to tax [fol. 609] ation. The tax sought to be collected does not violate our State Constitution.

The Chemical Company's objections to Article 5248 as being unconstitutional have been effectively disposed of by the Supreme Court of the United States in its opinions in the cases discussed below. The case of *U. S. of America and Borg-Warner Corporation (Detroit Gear Division) v. City of Detroit*, — U. S. —, 78 S. Ct. 474, 2 L. Ed. 2d 424, is directly in point. In 1953 the Legislature of the State of Michigan passed Public Act 189 providing that when tax-exempt property is used by a private party in a business conducted for profit, the private party is subject to taxation to the same extent as though he owned the property. The pertinent parts of that Act are "when any real property which for any reason is exempt from taxation is leased, loaned, or otherwise made available to and used by a private individual, . . . in connection with a business conducted for profit, [it] . . . shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property . . ." The United States was owner of an industrial plant in Detroit, Michigan. It leased a portion of that plant to Borg-Warner Corporation at a stipulated annual rental for use in the latter's private manufacturing business. The lease provided that Borg-Warner could deduct from the agreed rental any taxes paid by it under Public Act 189 or similar state statutes enacted during the term of the lease, but the Government reserved the right to contest the validity of such taxes. On January 1, 1954, a tax was assessed against

Borg-Warner under Public Act 189. The tax was based on the value of the property leased and computed at the rate used for calculating real property taxes. Under protest Borg-Warner paid part of the assessment. Sub [fol. 610] sequently the United States and Borg-Warner filed this suit in a state court for refund of the amount paid. They charged that the tax was repugnant to the Constitution of the United States because it imposed a levy upon government property and discriminated against those using such property. The lower court, however, upheld the tax and the Michigan Supreme Court affirmed. 345 Mich. 601, 77 N.W. 2d 79. The Michigan Supreme Court ruled that the tax was neither discriminatory nor was it on property of the United States, but instead was a tax on the lessee's privilege of using the property in a private business conducted for profit. After stating that a state cannot constitutionally levy a tax directly against the Government of the United States or its property without consent of Congress, and that private parties with whom the Government does business cannot escape state taxation, the United States Supreme Court says:

"The Michigan statute challenged here imposes a tax on private lessees and users of tax-exempt property who use such property in a business conducted for profit. Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury."

The Court upholds the validity of the assessed taxes saying:

"A tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country. See *Henneford v. Silas Mason Co.*, 300 U. S. 577, 582-583. In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property

used; indeed no more so than measuring a sales tax by the value of the property sold. Public Act 189 was apparently designed to equalize the annual tax burden carried by private businesses using exempt property with that of similar businesses using non-exempt property. Other things being the same, it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval. In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for Michigan to compute its tax by the value of the property used."

The Court finally concludes:

"Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law. Cf. *Penn-Dairies v. Milk Control System*, 318 U.S. 257, 270. Of course this is not to say that Congress, acting within the proper scope of its power, cannot confer immunity by statute where it does not exist constitutionally. Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve. As the Government points out Congress has already extensively legislated in this area by permitting States to tax what would have otherwise been immune. To hold that the tax imposed here on a private business violates the Government's constitutional tax immunity would improperly impair the taxing power of the State. Affirmed."

To the same effect are the companion cases decided the same day, (Mar. 3, 1958), *City of Detroit, a Michigan Municipal Corporation, et al. v. The Murray Corporation of America, a Delaware Corporation, and the United States of America and City of Detroit, a Michigan Municipal*

Corporation v. The Murray Corporation of America, a Delaware Corporation, and the United States of America — U.S. —, 78 S. Ct. 458, 2 L. Ed. 2d 441; United States of America v. Township of Muskegon, a Municipal Corporation and Continental Motors Corporation v. Township of Muskegon, a Municipal Corporation, — U.S. —, 78 S. Ct. 483, 2 L. Ed. 2d 436. These cases clearly uphold the validity of the taxes assessed by the School District against the Chemical Company since March 17, 1950 insofar as the Federal Constitution and laws are concerned.

The Supreme Court of Michigan in its opinion—which was affirmed by the U. S. Supreme Court above—takes up and disposes of the objections made by the Government and Borg Warner to the taxes assessed against them. Much of what is said by that Court is applicable to our case. Particularly applicable is the following quotation (United States and Borg-Warner Corporation v. City of Detroit, 345 Mich. 601, 77 N. W. 2d 79 (1956)):

"As defendant in the instant case properly points out, lessees of private nontax-exempt real estate ordinarily bear the tax burden thereon, either by direct payment thereof under lease requirements or by payment of rent sufficient to include the tax; and defendant reasons that the legislative intent here was to put such lessees of private property used by them in business conducted for profit on an equal footing with users of tax-exempt Government property used [fol. 612] by them in business conducted for profit, thus avoiding discrimination against the former and eliminating an element of unfair competition between them by requiring an equal tax burden as to both; and defendant urges that this does not evidence an intent on the part of the legislature to aim at or reach United States property for taxation but only to treat both classes of users equally."

On the question of unjust discrimination the case of Township of Muskegon v. Continental Motors Corporation, 346 Mich. 218, 77 N. W. 2d 799 (1956), affirmed 78 S.Ct. 483, 2 L.Ed. 2d 436, is applicable:

"The contention [of discrimination] is without merit. Indeed, when it is searchingly examined in light of the companion records that are before us, we should in my view conclude that the legislature by Act 189 has wisely effectuated its continuing duty of providing equal burdens and equal privileges for those of corresponding or similar situation. Without Act 189 a lessee or user for profit of Federally-owned tax immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local Government."

Other cases upholding a similar tax are *Trimble v. City of Seattle*, 231 U.S. 681, 58 L. Ed. 435, 34 S. Ct. 218, (1914); *Board of Supervisors of Leflore County v. Whittington*, 118 Miss. 799, 80 So. 8 (1918); *Gay v. Jemison*, 52 So. 2d 437 (Fla. 1951); *Meade Heights, Inc. v. State Tax Commission*, 95 A. 2d 280 (Md. 1953); *Sheridanville, Inc. v. Borough of Wrightstown*, 125 F. Supp. 743 (D. N. J. 1954), aff. *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir. 1955), cert. denied, 351 U.S. 962, 76 S. Ct. 1024 (1956); *Conley Housing Corporation v. Coleman*, 211 Ga. 835, 89 S.E. 2d 482 (1955); *Offutt Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N. W. 2d 382, aff. 351 U. S. 253, 76 S. Ct. 814 (1956); *State of Missouri v. Personnel Housing, Inc.*, 300 S. W. 2d 506, (Mo. 1957); *Bragg Investment Company, Inc. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341, (1957).

Chemical Company contends that if Article 5248 is given the construction we have given it, it would be unconstitutional as being discriminatory between lessees of United States government property and lessees of State-owned and other exempt properties. United States government property may not be taxed by a state except by consent of the Government. *McCullough v. State of Maryland*, 410 U.S. 613, 4 Wheat. 316, 4 L. Ed. 579; *Van Brocklin v. Anderson*, 117 U. S. 151, 6 S. Ct. 670, 29 L. Ed. 845. The State of Texas recognizes this exemption of United States government property. Article 5248, Vernon's Annotated

Texas Civil Statutes to first proviso added by the amendment of 1950; Section 4 of Article 7150, Vernon's Annotated Texas Civil Statutes. The various provisions of Article 7150 setting forth what property is exempt contain language to the effect that such exemption from taxation shall apply only if the exempt property is " . . . not leased or otherwise used with a view to profit other than for the purpose of maintaining the building, . . . " (Sees. 1, 2, 2a, 3, 7, 16). Thus we see that all property owned by private individuals is subject to taxation when not used for a purpose covered by the exemption statutes, and is taxable for the full value of the property.

Chemical Company relies upon the cases of *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99 (1888); *Taylor v. Robinson*, 72 Tex. 364, 10 S.W. 245 (1888); *State v. Taylor*, 72 Tex. 297, 12 S.W. 176 (1888); *Bashara v. Saratoga Independent School Dist.*, 139 Tex. 532, 163 S. W. 2d 631, 633, (1942); and Articles 7173 and 7174, Vernon's Annotated Civil Statutes, to support their contentions that the taxes are illegal and void. The cases of *Daugherty v. Thompson*, *supra*; *Taylor v. Robinson*, *supra*; *State v. Taylor*, *supra*, all have to do with an attempt to tax public school lands, or some interest therein. The Court held that under the Constitution of Texas as it existed at that time these school lands or any interest therein, were not subject to taxation. The case of *Daugherty v. Thompson* discusses the applicability of Articles 4691, 4692 (1888-1889) and now Articles 7173 and 7174 in connection with the right of the Legislature to exempt property from taxation under Article 4673 and now Article 7150. The Court said:

" . . . That section of the constitution [Art. 8, Sec. 2] seems to apply to property owned by persons or corporations in private right, but which, from the use to which it is applied, is, in a qualified sense, deemed public property. Leases of such property for a purpose not carrying the exemption from taxation would doubtless be embraced in article 4691 [now Art. 7173 Rev. St., and therefore subject to taxation against the holder of the leasehold, if it be for a term of three



or more years. Such property, if leased *for a term of less than three years* for a purpose not carrying the exemption, *would be subject to taxation; but, in [fol. 614] the absence of a statute so directing, such a leasehold would not be taxable against the lessee.* \* \* \* (Emphasis added).

In our case the Legislature in amending Article 5248 has "so directed" the taxation of the property against the user and occupier thereof. Again the Court says: " \* \* \* property exempted from taxation in the hands of its owner while used for the purposes on account of which the exemption is given, will doubtless become subject to taxation *if leased*, for any period, to be used for a purpose which does not itself give the exemption, unless in cases in which the exemption is given by the Constitution, or under a contract that would be impaired by taxation, \* \* \* "

While it is true the Legislature has included what are now Articles 7173 and 7174, Vernon's Annotated Texas Civil Statutes, in each revision made since the Daugherty v. Thompson case, it is also true that in 1927 the people of this State adopted an amendment to Article 7 of our State Constitution, known as Article 6a, which makes the State school lands subject to taxation. The Legislature passed Article 7150a in 1927 and Article 7150c in 1931 so as to take away the exemption theretofore enjoyed by the public school lands. Since the above Articles were passed, public school lands have been subject to taxation by the political subdivisions of the State. The above cases are no longer controlling. Neither are Articles 7173 and 7174.

The interest of a lessee in an oil or gas lease is taxable upon the value of such interest. Hager v. Stakes, 116 Tex. 453, 294 S.W. 835, (1927); Tennant v. Dunn, 130 Tex. 285, 110 S.W. 2d 53, (1937); Big Lake Oil Co. v. Reagan County, Tex. Civ. App., 1948, 217 S.W. 2d 171, 174 (10, 11), wr. ref. The taxes levied against Chemical Company are levied under Article 5248 which covers any interest that Chemical Company has in the property composing "Cactus Ordnance Works"—whether by lease

hold or in any other manner. It is not a tax levied only on a leasehold. It is a tax levied against the *user and* [fol. 615] *occupier* of such property and is based on the value of the property *used and occupied* by it.

"The burden of levying taxes rests on the legislature, and that body has plenary power of prescribing the mode of taxation to raise revenue; and the specification of certain objects and subjects of taxation in the Constitution does not prevent it from passing laws requiring other subjects and objects to be taxed, unless expressly prohibited by the Constitution. Section 17 of Article 8, Constitution, Vernon's Ann. St." *State v. Wynne*, 134 Tex. 455, 133 S.W. 2d 951, 958.

And further from *Green v. Frazier*, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878:

"\* \* \* The tax power of the State is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action."

See also *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 120-124, 54 L. Ed. 688, 30 S. Ct. 496. We hold that Article 5248 is not in violation of the 14th Amendment to the Federal Constitution; that it is not discriminatory and that it is valid legislation and authorized the taxation of Chemical Company's property by the school district.

In the case of *Bashara v. Saratoga Independent School Dist.*, 139 Tex. 532, 163 S.W. 2d 631, the School District sought to collect taxes from Bashara on all of the interest and estate in a 136-acre tract of land. Bashara did

not own all the mineral estate thereunder and was not in control of, using, or occupying, or enjoying any part of a 2/3rds of 1/8th royalty interest in all oil, gas, or other minerals, which had been expressly reserved by a Mrs. [fol. 616] Baker, Bashara's grantor, in the deed whereby Bashara received title to his interest in the 136 acres. This Court held the reserved interest was not taxable to Bashara; that it was an estate in land which Bashara did not own, and, therefore, there was no personal liability on Bashara for the taxes. In the case at bar the tax sought to be enjoined was levied by virtue of specific legislative authority that the user and occupier of United States Government property should pay taxes assessed on the basis of the value of the property it was using, occupying and enjoying.

We overrule the School District's contention in its application that taxes for 1949 through March 16, 1950 are a valid charge against the Chemical Company. The assent given by Congress to taxation of this plant was not effective in this State until the amendment of Article 5248 March 17, 1950, and it is only from and after this date that this property may be lawfully taxed.

Judgments of both Courts below are affirmed.

Meade F. Griffin, Associate Justice.

MFG:hs

Associate Justices Garwood, Calvert and Walker dissenting.

Jun 18 1958

[fol. 617]

## DISSENTING OPINION—June 18, 1958

One naturally sympathizes with the desire to tax a federally owned plant, when used by a private lessee for purposes of profit, and especially when the federal government has consented to a tax being levied against "the lessee's interest" and has stipulated in the lease that the lessee shall pay whatever taxes are assessed. On the other hand, the responsibility of providing for taxes being legislative rather than judicial, courts should not strain as much as we have here done to plug rather obvious tax loopholes, which the Legislature can easily plug at any time and could as easily have plugged long ago.

Art. 5248, before the 1950 amendment, was undoubtedly not a taxing statute at all, but an exemption statute, found, as it was and still is, in Title 85, "Lands—Acquisition for Public Use", whereas our taxing statutes, with all of their hundreds of separate provisions, were and are found in Title 122 under the heading "Taxation". The addition of the 1950 proviso, to the effect that federally owned property when used and occupied by private parties "shall be subject to taxation by this State and its political subdivisions", did not convert what was theretofore a pure exemption statute into a taxing statute. It did not levy or provide for any tax, but simply qualified the express exemption theretofore existing, and the Attorney General of Texas has so ruled in his opinion S-124 as late as March 10, 1954.

It may be true that the amendment accomplished no great purpose, if it did not itself establish a tax. On the other hand, the article as it stood prior to the amendment likewise accomplished no great purpose, since it merely declared an exemption which undoubtedly already existed. The explanation of the amendment may well be that in 1950, following the 1948 Federal legislation per [fol. 618] mitting taxation of the lessee's interest in Federal lands, the Legislature simply felt it proper to add a corresponding limitation to the exemption of Art. 5248.

pending later enactment of appropriate taxing laws if found to be desirable.

Now, both before and since 1950, Art. 7173 of the taxing statutes provided that "Property held under a lease for a term of three years or more, \* \* \* belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, \* \* \*." This article deals expressly with the situation of exempt property leased to a private person—the same general situation we have here. *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99, states that the article is what governs in situations of leases of exempt property to private persons but also confirms the obvious fact that it imposes no tax, if the lease in question is for a term under three years.

In *Trammell v. Faught*, 74 Tex. 557, 12 S. W. 317, it was held with respect to state lands leased to private parties for a primary or basic term of more than three years, but subject to the right of the lessor-State to terminate within less than three years in the event it should sell the lands in question, that the lease was not "a lease for a term of three years or more" within the meaning of Art. 7173, *supra*. The Attorney General's opinion, S-124, *supra*, states that the taxability of Federal property leased to private parties is governed by Article 7173, notwithstanding the 1950 proviso to Art. 5248. It ruled that in the particular case, the tax upon the lessee provided by Art. 7173 was applicable, since the lease was for a term of 75 years, that is, "for a term of three years or more". In the instant case, the lease, being terminable by the lessor, upon ninety days' notice, in the event the property should be sold, is a lease for less than three years. If the lawmaking body did not like the result of *Trammell v. Faught*, *supra*, it could long ago have changed it without difficulty. Therefore no tax applies so far as Art. 7173 is concerned. What other article imposes a tax?

If we are to say that either the 1950 proviso in Art. 5248, or the general statement in Art. 7146 that all interests in land are taxable, imposes a tax on the short



term lessee as if he were the land owner, we reach the strange result that both long and short term lessees of [fol. 619] exempt property are so taxable, when Art. 7173 says that only long term lessees are so taxable. Certainly the normal course for the Legislature to pursue in 1950, if it intended to tax both short and long term lessees, would have been to amend Art. 7173 so as to strike out the words "for a term of three years or more". That it failed to take this simple and obvious step certainly does not suggest that we should assume the responsibility to take it.

There is also the matter of Art. 7174, providing that *leases* shall be taxed only upon their market value; and Daugherty v. Thompson, supra, says that there can be no tax against a lessee except it be based on the market value of the *lease*.

If the mentioned rule of Daugherty v. Thompson is to stand, then the tax here involved cannot stand. In the first place, that tax is one based on the fee value of the premises and thus cannot be collected, if the only tax incident to leases is one based on the value of the lease itself. Moreover, we cannot say that the 1950 proviso to Art. 5248 levied a tax on *lessees* of *federally* owned property, measured by the fee value thereof, while as to lessees of other exempt property (to whom 5248 could not possibly apply), the tax is only one upon the market value of the lease itself. The result would be to discriminate against lessees of federally owned property, because their tax (based on the fee value) will obviously be much higher than one based on the sale value of a mere lease, which would be applicable to lessees of other exempt property.

If the mentioned rule of Daugherty v. Thompson is to be discarded (after all these years) on the theory that Art. 7173 effectively imposed on long term lessees of exempt property the same kind of tax sought to be levied here, and that Art. 7174 deals with a different subject, we still have the peculiar result of a short term lessee being taxed on the basis of the full value of the premises, when Art. 7173 says that only long term lessees shall be so taxed.



It therefore appears to me that the tax sought to be collected in this case has no basis in law. By so declaring, and thus putting the matter squarely up to the Legislature, which has the authority and duty to correct statutory confusion and deficiencies of this sort, I think that [fol. 620] in the long run we will serve the public better than by ourselves attempting to do in roundabout fashion what we think the Legislature ought to have done. In this connection there can now be little doubt that a use tax on lessees (whether long term or short term) of exempt property measured by the value of the premises would be as valid under our state constitution as it evidently is under the constitution of the United States. Article 7174 can readily be amended so as to make it clearly inapplicable to leases of exempt property.

W. St. John Garwood, Associate Justice.

WSJG/p

Opinion delivered: Jun 18, 1958.

Oct. 22, 1958—Associate Justice Culver joins in this dissenting opinion on motion for rehearing.

[fol. 621]

#### DISSENTING OPINION—June 18, 1958

This case involves three basic questions, as follows: 1. Is Phillips Chemical Company's leasehold estate in the Cactus Ordnance Works taxable? 2. If it is, on what basis is it to be valued for tax purposes? 3. If it is, on what date did it become taxable?

Actually, the second question was severed by the trial court, was not tried and technically is not before us. But the three questions are so interrelated that a discussion and decision of the first and third questions require an incidental discussion and decision of the second.

My discussion will indicate not only my points of difference with the majority opinion but as well my points

of difference with the dissenting opinion filed by Associate Justice Garwood."

At the time Congress enacted Public Law 364 in 1948, under which Phillips holds its lease, the right of the State of Texas and its political subdivisions to tax exempt property which had been leased for a non-exempt use, as well as the basis for valuing such property, was then fixed and established by the Constitution and certain statutes and court decisions.

Section 1 of Article 8 of our State Constitution then provided and still provides: "Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

[fol. 622] Article 7146, V.A.T.S., then provided and still provides: "Real property for the purpose of taxation, shall be construed to include the land itself, \* \* \* and all the rights and privileges belonging or in anywise appertaining thereto \* \* \*."

Article 7173, V.A.T.S., then provided and still provides: "Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law. \* \* \*"

Article 7174, V.A.T.S., then provided, in part, and still provides: "Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

Article 5248, V.A.T.S., then provided: "The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise."

In 1888, this Court, in *Daugherty v. Thompson*, 71 Tex. 192, 9 S.W. 99, with Articles 7146, 7173 and 7174 before it, made the following significant holdings:

1. Neither the fee nor a leasehold interest in County public school land is taxable.

2. Exempt property, when leased for a non-exempt purpose for any term, will "doubtless become subject to taxation," but "it does not follow that a lessee will be liable to pay taxes on the leasehold, unless the law so provides."

3. Privately owned exempt property, leased for a non-exempt purpose, will be subject to taxation at its full value to the owner.

4. The Legislature has the power to impose a tax on [fol. 623] the value of a leasehold, on the lessee.

5. "In cases to which Article 4691 (7173) is applicable, it must be held that it was the intention of the legislature only to impose on the lessee a tax based on the value of the 'taxable leasehold estate,' and not impose upon him a tax based on a sum equal to the full value of the real estate."

6. Article 7173 is the *only* statute authorizing taxation of leasehold estates.

In 1889, this Court held in *Trammell v. Faught*, 74 Tex. 556, 12 S.W. 317, that a lease of state owned lands for terms of six and ten years, subject to cancellation upon sale, were not leases "for a term of three years or more" within the meaning of Article 7173.

In 1944, the Supreme Court of the United States held in *United States v. Allegheny County, Pennsylvania*, 322 U.S. 174, 64 S. Ct. 908, 88 L. Ed. 1209, that a leasehold estate in federally owned property was not subject to local taxation.

Section 6a of Article 7 of our State Constitution was adopted in 1926 withdrawing county school lands from the class of lands exempt from taxes, and Article 7150a,

V.A.T.S., was enacted in 1927 providing for the payment of taxes on county owned school lands *in the counties*.

Such was the status of the law in this State when Public Law 364 was enacted by Congress in 1948. The following developments thereafter occurred:

Effective March 17, 1950 the Legislature amended Article 5248 to provide "that any portion of said lands and improvements [federally owned] which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

In the series of cases recently decided by the Supreme Court of the United States, cited in the majority opinion, it is now held that leasehold estates in federally owned [fol. 624] lands are subject to local taxation. Moreover, it is held that they *may* be made taxable to the lessee as though he were the fee owner. There is, therefore, now no Congressional Act or decision of the Supreme Court of the United States which stands as a bar to local taxation of leasehold estates in federally owned lands as here involved *because* they are federally owned, or which, for that reason alone, prohibits their taxation to the lessee as though he were the owner of the fee. But the absence of such a bar or prohibition does not mean that such leasehold estates may be taxed to the lessee as though he is the owner, or even that they may be taxed to him at all. They may *not* be so taxed under enumerated holding Number 2 in *Daugherty v. Thompson* unless their taxation is authorized by state law. And it goes without saying that lessees of federally owned lands may not be singled out as objects of discriminatory taxation. Discriminatory taxation is prohibited by Article 1, sec. 3 and Article 8, sec. 1 of the Constitution of Texas and by the Fourteenth Amendment to the Constitution of the United States.

In my opinion it was the purpose of the 1950 amendment to Article 5248 to authorize taxation of leasehold estates in federally owned lands to lessees. On this point I agree with the majority opinion and disagree with the dissenting

opinion filed by Justice Garwood. True, the amendment provision is not placed in the Taxation Title of our statutes and does not *specifically* provide that federally owned lands used for private business shall be taxed to the *user*, but I think it the clear purport and intendment of the amendment that it be so taxed.

State statutes do not ordinarily *levy* ad valorem taxes; they only *authorize* the levy of ad valorem taxes by state and local taxing agencies. The amendment to Art. 5248 is sufficient for that purpose. Moreover, the Legislature could hardly have intended by the amendment that taxes would be assessed to the United States, as owner, for it had been held in *McCulloch v. Maryland*, 4 Wheat. 316, 4 [fol. 625] L. Ed. 579, that local taxes could not be imposed on property of the United States without consent of Congress, and Public Law 364 did not provide that they could. It seems to me, therefore, that the amendment to Article 5248, reasonably interpreted, purports to authorize taxation of leasehold estates in federally owned lands. In the latter respect it can be said that the amendment meets enumerated holdings 2 and 4 of *Daugherty v. Thompson*.

The majority have held that the amendment to Article 5248 authorizes taxation of leasehold estates in federally owned lands to lessees *as though they are the owners* of the land, and, thus holding, have upheld the validity of the amendment against the claim that it is unjustly discriminatory. I do not agree with either of those conclusions. They have been reached without reference to enumerated holding Number 5 of *Daugherty v. Thompson*, without overruling either that holding or *Trammell v. Faught*, and without examination of the discriminatory features of the amendment.

Enumerated holding Number 6 in *Daugherty v. Thompson* is that Article 7173 (4691) is the "only law providing that the lessee shall pay taxes on leased property." That article provided then and provides now for taxation of leasehold estates in exempt property *only* when the lease is "for a term of three years or more." There is no statute authorizing taxation of leasehold estates in exempt property owned privately or by the State or its subdivisions when the lease is for a term of *less* than three years. The



amendment to Article 5248, considered alone and apart, purports to authorize taxation of leasehold estates in federally owned property *even though the lease be for a term of less than three years*. If that be the proper construction of the amendment, it is quite obviously discriminatory against lessees of federally owned exempt property. I know of no sound basis for such discrimination.

A better construction of the amendment to Article 5248 is to say that it must be read in connection with and is controlled by the provisions of Article 7173. Under that [fol. 626] construction, we can say that leasehold estates in federally owned property are taxable, but *only* when the lease is "for a term of three years or more." That construction will obviate a holding that the amendment is *per se* discriminatory.

That brings us to the question of whether Phillips' lease is "for a term of three years or more." The lease gives an absolute right of cancellation in the event of sale of the property. In that respect it is identical with the lease in *Trammel v. Faught*. Unless *Trammel v. Faught* be overruled—and the majority opinion does not suggest that it should be overruled—we must hold that Phillips' lease is *not* one "for a term of three years or more." So holding, we must then hold that the amendment to Article 5248, as qualified by Art. 7173 and enumerated holding Number 5 in *Daugherty v. Thompson*, does not authorize taxation to Phillips of its leasehold estate in Cactus Ordinance (sic) Works on any basis.

Even if *Trammel v. Faught* should be overruled and it should now be held that leases of the type considered in *Trammel v. Faught* and held by Phillips are leases for the full term stipulated subject to a conditional limitation, I yet could not agree with the majority's holding that the property should be taxed to Phillips as though it were the owner of the fee. Here again the majority holding runs squarely into the equal protection clauses of our Constitutions.

Under enumerated holding Number 5 in *Daugherty v. Thompson* it is expressly held, with respect to leasehold estates "for a term of three years or more" made taxable by Article 7173, "that it was the intention of the legislature



only to impose on the lessee a tax based on the value of the 'taxable leasehold estate,' and not impose upon him a tax based on a sum equal to the full value of the real estate." I can conceive of no sound basis for saying that that holding will apply to leasehold estates in state owned and privately owned exempt property when the lease is "for a term of three years or more" but will not apply to leasehold estates in federally owned property. The holding of the majority, without overruling enumerated holding Number 5 of *Daugherty v. Thompson*, obviously results in unjust discrimination against lessees of federally owned property.

The majority seek to justify their holding that a leasehold estate in federally owned land may be taxed on the full value of the fee by referring to the adoption of Section 6a of Article 7 of the Constitution, the enactment of Articles 7150a and 7150c, certain provisions of Article 7150, and the series of cases recently decided by the Supreme Court of the United States. I respectfully suggest that none of the matters to which reference is made avoid or justify the discrimination which results from the majority's holding.

As heretofore noted, adoption of Section 6a of Article 7 of the State Constitution and the enactment of Article 7150a only withdrew the exemption from taxation theretofore accorded county owned school lands. I find no provision in either of those enactments which permits taxation of leasehold estates in such lands. On the contrary, Article 7150a specifically provides that the counties shall themselves pay taxes levied against such lands. Under enumerated holding Number 2 of *Daugherty v. Thompson* leasehold estates in such lands may *not* be taxed until the legislature so provides. The same may be said with respect to Article 7150c enacted in 1931. That Article authorizes payment by the State of local taxes on lands set apart for endowment of the University of Texas. It does not provide for taxation of leasehold estates in such lands.

The specific provisions in Article 7150, referred to by the majority as indicating that property there listed as exempt will not be exempt if it is "leased or otherwise used for profit", are the identical provisions which were in the

early counterpart of Article 7150 (4673) and were said by this Court in *Daugherty v. Thompson* *not* to authorize taxation of leasehold estates in the property. See 9 S.W. [fol. 628] 100, 101. Surely those provisions have no stronger force now than they had then.

The decisions of the Supreme Court of Michigan in *United States of America and Borg-Warner Corp. v. City of Detroit*, 345 Mich. 601, 77 N.W.2d 79, and *Township of Muskegon v. Continental Motors Corp.*, 346 Mich. 218, 77 N.W.2d 799, and the decisions of the Supreme Court of the United States in the same cases (see 352 U.S. 963, 78 S. Ct. 474, 2 L. Ed.2d 424 and 352 U.S. 962, 78 S. Ct. 483, 2 L. Ed.2d 436) are not in point and cannot be made controlling on the question at issue in this case. The principal reason they are not in point is because of the vast difference between Michigan and Texas statutory provisions governing taxation of leasehold estates.

The portion of Michigan Public Act 189 quoted in the majority opinion shows clearly that it authorizes taxation of leasehold estates of *whatever duration* in *all* exempt property to the lessees as though they were the owners of the property. Our statute, interpreted in the light of *Trammell v. Faught* and *Daugherty v. Thompson*, authorizes taxation of leasehold estates *only* in federally owned property, *only* when the lease is "for a term of three or more years" and *only* on the fair market value of the leasehold estate. Obviously we are not dealing with the same problem that was before the Supreme Court of Michigan and the Supreme Court of the United States in the cited cases.

The Supreme Court of the United States made clear in the *Borg-Warner* case that local taxing units would not be permitted to assess and collect discriminatory taxes from lessees of federally owned property, when it said:

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *McCulloch v. Maryland*, 4 Wheat. 316. But here the tax applies to every private

party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations [fol. 629] and a great host of other entities. \* \*

Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed."

In Texas, under existing law, there is no authority for taxing leasehold estates created by leases for a term of less than three years in either non-exempt or exempt property, and leasehold estates in exempt property owned either privately or by the state and its subdivisions created by leases for a term of three years or more may only be taxed on their fair market value. And yet the majority hold in this case that leasehold estates in federal property created by leases for a term of less than three years may be taxed and that they may be taxed on the full value of the fee.

I conclude: 1. That the amendment to Article 5248 authorizes taxation of leasehold estates in federally owned property. 2. That the amendment to Article 5248 is discriminatory and unconstitutional unless it be construed to apply only to leasehold estates of three or more years duration. 3. That the amendment may properly be held to apply only to leasehold estates of three or more years duration. 4. That the amendment is still discriminatory and unconstitutional if it be construed to authorize taxation of leasehold estates to lessees as owners. 5. That the amendment may properly be construed to authorize taxation of leasehold estates of a duration of three or more years at their fair market value. 6. That unless and until *Trammell v. Faught* is overruled, Phillips' leasehold estate in Cactus Ordnance Works is for a term of less than three years. 7. That Phillips' leasehold estate is not subject to taxation, and the taxes levied on such estate by Dumas Independent School District may not

be sustained. 8. That the judgments of the trial court and of the Court of Civil Appeals should therefore be reversed and judgment be rendered in favor of Phillips. 9. That Phillips' leasehold estate may be taxed only by [fol. 630] overruling *Trammell v. Faught*, and then may be taxed on the full value of the fee only by overruling certain of the holdings in *Daugherty v. Thompson*.

Unless the mentioned holdings in *Daugherty v. Thompson* are overruled, I agree with the majority's holding that there is no statutory authority for taxation of Phillips' leasehold estate prior to the date of the amendment to Article 5248 in 1950.

Robert W. Calvert, Associate Justice.

RWC:W

Opinion delivered: Jun 18 1958.

Associate Justice Walker joins in this dissent.

[fol. 631]

IN THE SUPREME COURT OF TEXAS

No. A-6639

From Moore County, Seventh District.

PHILLIPS CHEMICAL COMPANY,

VS.

DUMAS INDEPENDENT SCHOOL DISTRICT.

JUDGMENT—June 18, 1958

This cause came on to be heard on writs of error to the Court of Civil Appeals for the Seventh Supreme Judicial District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was no error in the judg

ment of the Court of Civil Appeals, which affirmed judgment of the District Court, it is therefore *adjudged, ordered and decreed* that the judgments of the Court of Civil Appeals and District Court be, and hereby are, in all things affirmed; that petitioner respondent, Phillips Chemical Company, and its surety, United States Fidelity and Guaranty Company, pay all costs by it expended and incurred in this Court and the Court of Civil Appeals; that respondent-petitioner, Dumas Independent School District, pay all costs by it expended and incurred in this Court, and that this decision be certified to the District Court of Moore County, Texas, for observance.

[fol. 632]

~~MOTION FOR REHEARING—CAUSE~~

A 6639

No. A-6639

IN THE SUPREME COURT OF TEXAS

PHILLIPS CHEMICAL COMPANY, Petitioner,

v.

DUMAS INDEPENDENT SCHOOL DISTRICT, Respondent.

MOTION FOR REHEARING—Filed July 3, 1958

[Omitted in printing]

[fol. 660]

RESPONDENT'S REPLY TO PETITIONER'S MOTION FOR REHEARING

[Omitted in printing]

[fol. 680]

IN THE SUPREME COURT OF TEXAS  
From Moore County, Seventh District.

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—  
October 22, 1958

This day came on to be heard motion of Phillips Chemical Company for rehearing in the above numbered and styled cause, and, after due consideration, it is ordered that said motion be, and hereby is, overruled.

[fol. 681]

No. A-6639

IN THE SUPREME COURT OF TEXAS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed January 15, 1959

I.

Notice is hereby given that Phillips Chemical Company, the Petitioner named above, hereby appeals to the Supreme Court of the United States from that part of the final Judgment of the Supreme Court of Texas entered on June 18, 1958, affirming judgments of the Court of Civil Appeals for the Seventh Supreme Judicial District, and of the Sixty-Ninth District Court of Moore County, Texas, which pertains to the period, March 17, 1950, through the tax year 1954, and denied the relief sought by Petitioner for such period (permanent injunction against taxation and cancellation of tax assessments for Federally-owned Cactus Ordnance Works). Petitioner's Motion for Rehearing of the final Judgment of the Supreme Court of Texas was overruled October 22, 1958.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2), Act of June 25, 1948, c. 646, 62 Stat. 929.



## II.

The clerk will please prepare and certify a transcript of the record in this case for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

A. From the proceedings in the District Court of Moore County, Texas, Sixty-Ninth Judicial District, Case No. 2708-A:

1. Judgment of the Court.
2. Plaintiff's First Amended Original Petition.  
[fol. 682]
3. Defendant's First Amended Original Answer and Cross Action.
4. Order on Plaintiff's Motion for Separate Trial entered on September 18, 1956.
5. Correction Order dated November 12, 1956.
6. Plaintiff's Request for Admissions.
7. Defendant's Reply to Request for Admissions.
8. All of the Statement of Facts in said case, except that part starting with the first question on page 197 of the Statement of Facts, down to "witness excused," on page 347, it being intended hereby that the matter between the indicated points on pages 197 and 347 be omitted, and that the balance of the Statement of Facts be included.

B. From the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, Sitting at Amarillo, Texas, Case No. 6697:

1. The Opinion and the Judgment dated September 30, 1957.
2. The Motion for Rehearing of Appellant, Phillips Chemical Company.
3. The Opinion and the Order of the Court on Motions for Rehearing, dated November 4, 1957.

C. Proceedings in the Supreme Court of Texas, Case No. A-6639:

1. Opinion of the Court and Dissenting Opinions handed down on June 18, 1958.
2. Judgment.
3. The Application for Writ of Error of Petitioner, Phillips Chemical Company.
4. The Motion for Rehearing of Phillips Chemical Company.
5. The Order of the Supreme Court of Texas, Overruling Motion for Rehearing, entered on October 22, 1958.
6. This Notice of Appeal.
7. Any additional stipulation or designation of matter to be included in the transcript.

[fol. 683]

### III.

The following questions are presented by this appeal.

The Supreme Court of Texas has held that Respondent, Dumas Independent School District, may tax Petitioner, the lessee of Federally-owned property known as Cactus Ordnance Works, for the full fee value of such property under the authority of Article 5248, Revised Civil Statutes of Texas, as amended by an Act of the Legislature of Texas (Texas Session Laws 1950, Fifty-First Legislature, First Called Session, Chap. 37, page 105), effective March 17, 1950. This Amendment to Article 5248 made Federally-owned property located in the State of Texas, if used or occupied by a lessee or user for a private purpose, subject to taxation at its full fee value against said user or occupier thereof. The Statute covers and affects only Federally-owned property. Such Statute, when implemented (as it must be in order to achieve any effectiveness at all) by the framework of the State ad valorem tax provisions (Title 122, Revised Civil Statutes of Texas), applies in each tax year to any lessee or user of Federally-owned property who uses and occupies the property on

January 1 of the tax year, regardless of whether the right of use and occupancy be for one day or for ninety-nine years. At the same time, there are no comparable taxing statutes in Texas applicable to the property of the State and its political subdivisions, or to the lessees or users thereof. Such property, at its full fee value, is in no instance taxable to the lessee or user thereof. Leaseholds in such property, if for an absolute term of three years or more, are subject to taxation to the lessees, but then only upon the value of the leasehold, as distinguished from the full fee value of the property itself. In other words, if Phillips Chemical Company held the very same lease on State property, it would, under Texas law, not be liable for any taxes whatever by reason thereof, either directly or indirectly, but solely because of Federal ownership of the property, it is, under said Article 5248, as amended, made liable for taxes based on the full fee value of the property. Under Texas law, in no instance is the lessee or user of non-Federal property, that is, the lessee or user of property of the State, cities, counties, school districts, religious and charitable organizations, or other exempt owners, made liable for taxes based on the [fol. 684] full fee value of the property. The specific questions presented by this appeal are:

(1) Is Article 5248, Revised Civil Statutes of Texas, as amended by an Act of the Legislature of Texas (Texas Session Laws 1950, Fifty-First Legislature, First Called Session, Chap. 37, page 105), effective March 17, 1950, which undertakes to impose a substantial tax burden on lessees or users of property owned by the United States, while at the same time, the State laws impose either no tax burden or a substantially less tax burden on lessees or users of State-owned property and other exempt property, void as discriminating against the United States and those with whom it deals and as imposing an unconstitutional burden on the activities of the Federal Government and infringing its sovereignty?

(2) Is Article 5248, Revised Civil Statutes of Texas, as amended by an Act of the Legislature of Texas

(Texas Session Laws 1950, Fifty-First Legislature, First Called Session, Chap. 37, page 105), effective March 17, 1950, void and unconstitutional under the Fourteenth Amendment to the United States Constitution, as constituting discriminatory, arbitrary class legislation and as denying the Petitioner, Phillips Chemical Company, the due process and equal protection of the laws?

• (3) Is Article 5248, Revised Civil Statutes of Texas, as amended by an Act of the Legislature of Texas (Texas Session Laws 1950, Fifty-First Legislature, First Called Session, Chap. 37, page 105), effective March 17, 1950, violative of the United States Constitution as taxing to Petitioner, Phillips Chemical Company, property of the United States of America which is exempt from taxation?

Rayburn L. Foster, Harry D. Turner, Bartlesville, Oklahoma; C. J. Roberts, Thomas M. Blume, C. Rex Boyd, 501 First National Bank Building, P. O. Box 1751, Amarillo, Texas, Attorneys for Petitioner, Phillips Chemical Company.

Thomas M. Blume, Of Counsel.

[fol. 685] Affidavit of Service (omitted in printing).

[fol. 686] *See Exhibit 1*  
[File endorsement omitted]

[Title omitted]

# DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL Filed January 27, 1959

To the Clerk of the Supreme Court of Texas:

Pursuant to Rule 12 (1) of the Revised Rules of the Supreme Court of the United States, Dumas Independent School District, Appellee, hereby designates the following to be added to the transcript of record in the above en-

titled cause to be filed in the Supreme Court of the United States pursuant to a Notice of Appeal filed herein.

1. The Reply of the Appellee, Dumas Independent School District, to the Motion for Rehearing of Appellant, Phillips Chemical Company, from the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo in Cause No. 6697.

2. The Reply of the Respondent, Dumas Independent School District, to the Application for Writ of Error of Petitioner, Phillips Chemical Company, in the Supreme Court of Texas; Cause No. A-6639.

3. The Reply of the Respondent, Dumas Independent School District, to the Motion for Rehearing of Petitioner, Phillips Chemical Company, in the Supreme Court of Texas, Cause No. A-6639.

Respectfully submitted

[fol. 687] James W. Witherspoon, John D. Aikin,  
Wayne E. Thomas, Earnest L. Langley, P.O. Box  
473, Hereford, Texas, Attorneys for Respondent,  
Dumas Independent School District.

James W. Witherspoon, Of Counsel.

Affidavit of Service (omitted in printing).

[fol. 688] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 689]

## SUPREME COURT OF THE UNITED STATES

No. 769—October Term, 1958.

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PHILLIPS CHEMICAL CO., Appellant,

vs.

DUMAS INDEPENDENT SCHOOL DISTRICT.

---

Appeal from the Supreme Court of the State of Texas.

ORDER NOTING PROBABLE JURISDICTION May 18, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The Solicitor General is invited to file a brief setting forth the views of the United States.

May 18, 1959.



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8. REPLY BRIEF FOR APPELLANT
9. APPELLEE'S PETITION FOR REHEARING

L. J. JURY  
U. S.  
JAM

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

No. ~~100~~ 40

PHILLIPS CHEMICAL COMPANY, A CORPORATION,  
*Appellant,*  
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

*On Appeal from the Supreme Court of the State of Texas*

---

**MOTION OF APPELLEE DUMAS INDEPENDENT  
SCHOOL DISTRICT TO DISMISS**

---

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,  
P. O. Box 473,  
Hereford, Texas,  
*Attorneys for Appellee,  
Dumas Independent School  
District.*

April 13, 1959

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**In the  
Supreme Court of the United States  
OCTOBER TERM, 1958**

---

**No. 769**

---

**PHILLIPS CHEMICAL COMPANY, A CORPORATION,**  
*Appellant,*

*v.*

**DUMAS INDEPENDENT SCHOOL DISTRICT,**  
*Appellee.*

---

*On Appeal from the Supreme Court of the State of Texas*

---

**MOTION OF APPELLEE DUMAS INDEPENDENT  
SCHOOL DISTRICT TO DISMISS**

---

Appellee Dumas Independent School District, pursuant to Rule 16 of the Revised Rules of this Court, moves this Court to dismiss the appeal in this case, on the ground that it does not present a substantial federal question.

**STATEMENT OF THE CASE**

This case involves the ad valorem taxation by appellee, a political Subdivision of the State of Texas, of the lessee's interest in Cactus Ordnance Works, a plant built and

owned in fee by the United States, but which has been used and occupied by Appellant in its private capacity and in the conduct of its private business, for profit, since August, 1918, under lease from the United States. (Tr. 61-62.)

The lease was executed by the United States pursuant to authority contained in the *Act of August 5, 1947, ch. 493, 61 Stat. 774*. This statute specifically provided that "[t]he lessee's interest, made or created pursuant to the provisions of [this act], shall be made subject to State or local taxation," and such potential taxability is implicit in the terms of the lease itself. (Tr. 111.) The State of Texas thereafter provided for such taxation through the enactment of *Texas Session Laws, 1950, Fifty-First Legislature, First Called Session, ch. 37, p. 105, Article 5248, Vernon's Annotated Civil Statutes*, as amended, effective March 17, 1950.

In 1954, Appellee served notice upon Appellant that its interest as lessee, and its right of use and occupancy, were deemed taxable, and appropriate assessments were made. In its Jurisdictional Statement, Appellant intimates that it was the fee title to the property that appellee attempted to subject to taxation (p. 7), but this was never intended and it is clear that Appellant's officers always understood that it was the lessee's interest that was being assessed (Tr. 317, 320, 322-323, 327-328). Further, the matter of assessment having received the approval of the Supreme Court of Texas, there is no question now presented to this Court concerning this matter. The tax in this case was assessed against Appellant, and was a tax on Appellant's interest

in the subject property, as lessee thereof with the right of use and occupancy in its private capacity and in the conduct of its private business or enterprise.

Appellant brought this suit to cancel the taxes assessed and to enjoin further assessment of similar taxes. The requested relief was granted for the period prior to the enactment of the 1950 amendment to *Article 5248, Vernon's Annotated Civil Statutes*, and Appellee does not here complain of the judgment of the Texas Courts on this point.

This appeal is from the judgment of the Supreme Court of the State of Texas, affirming both lower state courts, and holding:

(a) That *Article 5248* provides for a tax on the right of use and occupancy, measured by the entire value of a property belonging to the United States, if used and occupied by private business and operated for profit, with the tax assessed against such user and operator.

(b) That *Article 7146, Vernon's Annotated Civil Statutes*, by defining real property to include not only land, but "all of the rights and privileges belonging or in anywise appertaining thereto," thereby makes provision for the taxation of the lessee's right of use and occupancy as a type of real property.

(c) That the *Act of August 5, 1947, ch. 493, §6, 61 Stat. 774*, gives the express consent of Congress to such taxation of the lessee's property right of use and occupancy.

(d) The tax imposed does not result in unlawful discrimination against Appellant, under either the state or federal constitutions.

### THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL

The three questions presented by this appeal, as stated by Appellant, all assert the invalidity of the Texas statute, *Article 5248*, under the Constitution of the United States. The first two questions assert such invalidity on the grounds that the statute discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the federal government, infringes upon its sovereignty and constitutes discriminatory and arbitrary class legislation against lessees of federal property, thereby violating the Due Process and Equal Protection clauses of the Fourteenth Amendment.

These questions, and each and every phase thereof, have been conclusively answered and settled by this Court in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466; *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; and *United States v. Township of Muskegon*, 355 U. S. 484; and other cases hereafter cited and discussed.

The third question asserts such invalidity on the ground that the Texas statute assesses taxes to Appellant on property not owned by it, but owned by the United States. This question is, at least in part, a question of state law, involv-

ing the interpretation and application of the statute by the state Supreme Court; but to the extent that any federal question is involved, such question has likewise been conclusively settled by this Court in the cases above cited and to be hereafter cited.

None of the questions presented are substantial federal questions. The appeal should be dismissed.

# I.

## THIS CASE IS GOVERNED BY THE DECISIONS OF THIS COURT IN THE "MICHIGAN CASES"

Appellant contends that the present case presents substantial federal questions not determined by this Court in its decisions of March 3, 1958, in the "Michigan Cases," *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466; and *United States v. Township of Muskegon*, 355 U. S. 484. This contention is based upon the proposition that the Texas statute, as construed by the Supreme Court of Texas, so discriminates against the United States and its lessees, in particulars not found in the Michigan statute, as to render the Texas statute unconstitutional and void.

Appellee believes, on the other hand, that there is no unconstitutional discrimination, and that the Michigan cases are controlling, so that no substantial federal questions are presented. The question of discrimination is answered in the next section of this Motion, and the argu-



ments here will be confined to a discussion of the applicability of the Michigan decisions to the present appeal assuming that there is no discrimination.

The facts in the present case are virtually identical to those in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466. In each case, the government plant was leased for use in a private capacity, upon a stipulated annual rental. In each case, the state Supreme Court held that the lessee was liable for taxes based upon the value of the leased property. In each case, the appeal to this Court was grounded upon a charge that the statute involved was unconstitutional because it imposed a tax upon government property and discriminated against those using such property.

Such differences as exist in the two cases are to be found in the provisions of the respective statutes. The Michigan statute levies a use or privilege tax as such, while the Texas statute levies an ad valorem tax on the property right of use and occupancy of the property, as a species of real property under the Texas definition thereof. *Article 7146, Vernon's Annotated Civil Statutes*. Whatever name is given to the tax, however, it is clear that the Texas tax and the Michigan tax are identical in practical operation, by virtue of the Texas Court's interpretation of the Texas statute.

The only real difference in the statutes, or the taxes, then, is in the fact that the Texas statute applies only to users of federally-owned tax-exempt property while the

Michigan statute applies to all tax-exempt property. Only if this Court should hold that this circumstance makes for unconstitutional discrimination against Texas lessees of federal property, is there any distinction between the cases. For the reasons set forth in detail hereafter, Appellee believes that there is an adequate basis for the classification adopted, that the Texas statute is a permissible exercise of the taxing power of the State of Texas, and that no substantial federal question is presented by this appeal. Further, by virtue of the express consent of Congress to taxation of "the lessee's interest" in the property in the present case, Appellee believes that the question of discrimination against this lessee of the United States is removed from the case, *Act of August 5, 1947, ch. 493, §6, 61 Stat. 774*. If this is correct, then the *Borg-Warner* case is fully controlling of the present appeal.

## II.

### THE TAX DOES NOT DISCRIMINATE UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND ITS LESSEES

"Discrimination" and its derivatives are words with both good and bad connotations; one may be praised for being "discriminating" in his choices, based upon his ability to distinguish the subtle differences between things essentially alike, but he may be criticized if his "discrimination" is carried to the point of unfair or injurious distinctions not based upon pertinent classification. So it is with reference to "discrimination" by governmental action. Not all

discrimination is prohibited, and when based upon legitimate classification, it is enough that those in the same class are treated with equality. *Caskey Baking Company v. Commonwealth of Virginia*, 313 U. S. 117.

Thus, the question in cases of this kind is not whether there are distinctions in the tax treatment of the complaining party, but whether such distinctions are based upon reasonable and legitimate grounds. Appellant, in this case, appears to stand upon the proposition that the Texas classification scheme places lessees of federal property in one class and *all* lessees of other types of tax-exempt property in the other class, and that if *any* of the latter class is in any way more favored than the members of the former, then the classification is illegal. Appellee believes, on the other hand, that such broad classification is not required by the Constitution, and that, under the decisions of this Court, the tax here complained of is neither unreasonable, arbitrary, nor illegal.

A. Appellant complains that the tax in this case does not operate equally upon all lessees of tax-exempt property. Since the statute in question applies only to federal property, this proposition is true; but this is not the only tax statute Texas has, and when it is considered in its proper place in the broad scheme of Texas taxation, and in the light of constitutional limitations, the argument of discrimination fades away.

In the first place, much of the property other than federal that is ordinarily exempt from taxation in Texas loses

its exemption when it is not devoted exclusively to the use which gives rise to the exemption, or when it is used with a view to profit:

(1) The exemptions granted to schools and churches are closely limited by the statute itself. *Section 1, Article 7150, Vernon's Annotated Civil Statutes; Red v. Johnson, 53 Tex. 284.*

(2) State-owned farms employing convict labor are subject to taxation by counties and independent school district. *Section 4, Article 7150, Vernon's Annotated Civil Statutes.*

(3) State-owned prison properties are not exempt from payment of taxes for school bonds and school maintenance. *Sections 17, 18, Article 7150, Vernon's Annotated Civil Statutes.*

(4) County school lands are subject to taxation, except for State purposes, by special constitutional amendment and statute. *Section 6a, Article VII, Constitution of Texas; Article 7150a, Vernon's Annotated Civil Statutes;* and the tax lien attaches just as in other cases. *Childress County v. State of Texas, 127 Tex. 343, 88 S. W. 2d 85.*

(5) Lands set apart for the endowment of the University of Texas, an agency of the State, are subject to taxation for county purposes. *Article 7150c, Vernon's Annotated Civil Statutes.*

(6) Leaseholds of otherwise exempt property for terms of three years or longer, and property held under contract of purchase from an exempt owner, are subject to taxation. *Article 7173, Vernon's Annotated Civil Statutes; State of Texas v. Taylor, 72 Tex. 297, 12 S. W. 176.*

(7) Exclusive use for the exempt purpose, and use not with a view to profit, are the standards set up for exemption of virtually every type of exempt property. *Sections 1, 2, 2a, 3, 6, 7, 9, 10, 13, 14, 16, Article 7150, Vernon's Annotated Civil Statutes.*

As the above examples reflect, exemption from taxation in Texas is carefully circumscribed, and much of the property of the State and its agencies is subjected to at least limited taxation. The exemption is taken away when some good reason exists for doing so: for example, when prison farms compete with private farms, or when county and university lands constitute a large part of the wealth of certain areas of the State. Naturally, the self-interest of the State, for itself and its creatures, causes it to be more concerned for its own exemptions than for those of other entities, but this, in itself and within reasonable limitations, is not unconstitutional. "Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action." *Welch v. Henry*, 305 U. S. 134, 144; *Watson v. State Comptroller of the State of New York*, 254 U. S. 122, 124.

In its most recent pronouncement on the subject, this Court has recognized the place of "state policy" and "local interests" in determining questions of classification for tax purposes, *Allied Stores of Ohio, Inc. v. Bowers*, U. S. , 79 S. Ct. 437, so that, within proper constitutional limitations, self-interest may provide sufficient grounds for distinction in tax treatment.

B. Appellant argues here, however, that the Supremacy of the United States "and those with whom it deals" outweighs the matter of state policy, and requires a holding that the statute in question is illegally discriminatory solely because it applies only to lessees of federal property. This argument, which constitutes the crux of Appellant's case, is unsound.

1. The tax immunity of the United States does not extend to the private entities with whom it deals, and the enjoyment of a privilege conferred by the federal government upon an individual, even though to promote some federal governmental policy, does not relieve him from the taxation by a state or local government of his property or business used or carried on in the enjoyment of the privilege. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17; *Fox Film Corporation v. Doyal*, 286 U. S. 123; *Forbes v. Gracey*, 94 U. S. 762; *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375; *Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U. S. 291. A tax exemption applicable to the fee in land does not extend to the interest of a lessee, which is a separate and distinct property interest. *Jetton v. University of the South*, 208 U. S. 489.

2. Even if the immunity of the United States might otherwise be deemed to extend to its lessee, Congress has here expressly waived any such claim and has declared that the interest of the lessee shall be made subject to state or local taxation. *Act of August 5, 1947, ch. 493, 61 Stat. 775*. Granted that this statute does not confer a license



upon the states to discriminate against federal lessees, yet if other considerations do not infringe the constitutional limitations on state power, the matters of federal supremacy or sovereignty can not be deemed to be the deciding factor here. State law is controlling with reference to the measure or character of the tax, when the immunity is waived. *Reconstruction Finance Corporation v. Beaver County*, 328 U. S. 204. As this Court stated in the last cited case, if Congress had intended a uniform system of taxation of the taxable interests created, it could have so provided in the statute; and, of course, the interest of the lessee does not receive uniform treatment at the hands of the states. Cf. *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794; and note the distinction made by the Supreme Court of Texas in this case between the period before and that after March 17, 1950.

3. The only ground for complaint here by the United States (which, significantly, has not intervened here as it has in many other similar cases) would be that this tax, if sustained, would be an economic burden to the extent that it would diminish the rental value of its properties. Only to this extent, and only with reference to leases entered into hereafter, could the tax be a burden on the United States or its activities, since the lease here provides that the rent reserved will not be adjusted because of state or local taxation of the lessee's interest. (Tr. 111.) It is clear that a tax otherwise valid will not be deemed invalid because the economic incidence of it is upon the United States. *James v. Dravo Contracting Company*, 302 U. S. 134; *State*

of *Alabama v. King & Boozer*, 314 U. S. 1; *Esso Standard Oil Company v. Evans*, 345 U. S. 495.

C. A state tax law will not be deemed illegally discriminatory, or violative of the Equal Protection or Due Process clauses of the Constitution, where the tax classifications complained of are not arbitrary and unfair, but are based upon some reasonable differences between the classes established, and those differences need not be great or conspicuous in order to warrant classification. *Keeney v. Comptroller of the State of New York*, 222 U. S. 525; *Watson v. State Comptroller of the State of New York*, 254 U. S. 122; *Roberts & Schaefer Company v. Emmerson*, 271 U. S. 50. The discretion permitted to a State by the Federal Constitution in the laying of its taxes is very broad, and in classifying the subjects of taxation, if the ground of difference has a fair and substantial relation to the object of the legislation, under any state of facts that can reasonably be conceived, the tax will not be deemed violative of the Fourteenth Amendment. *Allied Stores of Ohio, Inc. v. Bowers*, U. S. , 79 S. Ct. 437.

Differences in classification, even when based upon minor differences, or governmental policy, are common in both statutory and case law:

(1) Compare the different federal tax treatment of state bank circulation (*Sections 4881-4883, 1954 Internal Revenue Code, 26 U. S. C. A. 4881-4883*) and national bank circulation (*Act of June 3, 1864, ch. 106, §41, 13 Stat. 111, 12 U. S. C. A. 541*).

(2) Only the real estate of Federal Reserve Banks is taxable (*Act of Dec. 23, 1913, ch. 6, §7, 38 Stat. 258, 12 U. S. C. A. 531*), but a much broader state tax is permitted on national banks generally (*Act of June 3, 1864, ch. 106, §41, 13 Stat. 111, 12 U. S. C. A. 548*). See also, with reference to other financial agencies of the United States, *12 U. S. C. A. 931, 1020f, 1261, 1433, 1464(h), 1723a(c), 1768, 1825*.

(3) While obligations of the United States had always been exempt from federal as well as state or local taxation, the federal exemption was removed by statute in 1941. *Act of Feb. 19, 1941, ch. 7, §4, 55 Stat. 9, 31 U. S. C. A. 742a*.

(4) A license tax on grain elevators located on railroad rights of way was held not illegally discriminatory, even though grain elevators not so located were not similarly taxed. *W. W. Cargill Company v. State of Minnesota, 180 U. S. 452*.

(5) A state income tax on individual income was not illegal, even though a corporation in the same circumstances was not taxed. *Lawrence v. State Tax Commission of State of Mississippi, 286 U. S. 276*.

(6) It is permissible to levy a tax on wholesale dealers in certain commodities without also taxing retail dealers, or dealers in different commodities. *Southwestern Oil Company v. State of Texas, 217 U. S. 114*.

The above are just a few of the many examples that could be given, but they should suffice to show that the

power to classify for taxation is so broad as to be virtually unlimited as a practical matter. Mr. Justice Frankfurter has referred to "the extremely limited restrictions that the Constitution places upon the States" in their power to lay taxes. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435, 445; and see *Northwestern States Portland Cement Company v. State of Minnesota*, U. S. , 79 S. Ct. 357, 362.

(d) This Court has aptly stated that the test for determining whether a tax infringes constitutional limitations is based upon the operating incidence of the tax, and that a tax is valid if it bears a proper relation to the opportunities given, protection afforded, and benefits conferred by the state. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435. This test is especially applicable in this case in determining the reasonableness of the classification established by the State of Texas. Appellant argues that it is classified as a lessee of Federal property, and that this class is arbitrary and unreasonable because it does not include lessees of state or municipal property. What Appellant would ignore here is the fact that the State of Texas does not own many millions of dollars worth of prime industrial plants that are required, by the demands of national security, to be maintained in a state of semi-readiness for arms production, and that can best be kept in such status by being leased to private industry. See *Senate Report No. 1409, 80th Congress, Second Session, 1948 U. S. Code Congressional Service 2290*. The existence of this "National Industrial Reserve," and the practice of

leasing the facilities to private concerns such as Appellant, thus creates a class of users and occupiers that differ from most industrial concerns only in the circumstance that their landlord pays no taxes on the leased premises. These lessees employ labor, their employees have children who attend local schools, and yet these lessees occupy properties which would not, except for statutes such as the Texas statute in question here, contribute to the cost and maintenance of these schools as other privately-owned properties do. As the Michigan Court said, with reference to its comparable statute: "Without Act 189 a lessee or user for profit of Federally-owned tax-immune realty becomes specially privileged and notably favored over his local classmates, and I refer to that class which directly shares the burdens as well as the benefits of local government." *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799, affirmed, 355 U. S. 484. When considered in this light, the reasonableness and simple justice of the classification adopted by the State of Texas, and permitted by the Congress, is clearly recognized.

### III.

#### THE TAX IS A TAX UPON THE PROPERTY OF APPELLEE AND NOT UPON FEDERAL PROPERTY

Except to the extent that the Supreme Court of Texas may have based its decision on untenable state grounds to avoid a legitimate solution to the applicable federal questions, its decision is controlling on the question of the type

of tax imposed by the statute, and the incidence of that tax. Appellant, in its argument here, implies that the Texas Court had no tenable basis for its holding that the tax is levied upon property of Appellant, and asserts that the tax is in fact levied upon federal property, assessed to a bailee thereof.

A. It is elementary that a statute will not be so construed as to render it invalid if it can be reasonably construed otherwise. Since this statute would clearly be unconstitutional if it purported to levy a direct tax upon federal property, the Texas Court was authorized to find that the tax was not so intended, if the state law allowed any other reasonable construction. That the construction adopted is consonant with established principles of Texas law is demonstrated by the opinion of the Texas Court:

(1) Both the Constitution and statutes of the State provide for taxation of "all property" not specifically exempted.

(2) Many types of property rights less than fee simple ownership are taxable under Texas law. *State of Texas v. Wynne*, 134 Tex. 455, 133 S. W. 2d 951; *Hager v. Stakes*, 116 Tex. 453, 294 S. W. 835; *State of Texas v. Austin & N. W. R. Company*, 94 Tex. 530, 62 S. W. 1050; *Hydrocarbon Production Co., Inc. v. Valley Acres Water District*, 204 F. 2d 212 (5th Cir.); *Downman v. State of Texas*, 231 U. S. 353; Articles 7173, 7173a, *Vernon's Annotated Civil States*.

(3) Article 7146, *Vernon's Annotated Civil Statutes*, defines real property to include not only the land itself but



"all of the rights and privileges belonging or in anywise appertaining thereto," and the Texas Court held that a right of use and occupancy for profit is a valuable property right that is subject to taxation. This Court has approved such a definition as including leaseholds under the Washington statute, which is identical in terms to the Texas statute. *Trimble v. City of Seattle*, 231 U. S. 683; see *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 506.

B. This Court has approved taxation of lesser interests than the fee on many occasions. *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States v. Township of Muskegon*, 355 U. S. 484; *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253; *Trimble v. City of Seattle*, 231 U. S. 683; *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir.), cert. denied, 351 U. S. 962.

C. Nothing contained in the Texas statutes, or in the opinions or judgments of the Texas courts in this case, demonstrates an attempt to levy upon the United States or its property, to interfere with its operations or its treasury, or to do more than assess against Appellant, a private corporation, a tax for which it alone is liable. No lien is asserted or implied against the United States or its property. The failure of the statute to state specifically that no lien is provided does not invalidate the statute, since the non-existence of the lien is self-evident.

D. *United States v. Allegheny County*, 322 U. S. 174, is not at all in point here. Although the value of the fed-

eral property was used as a measure of the tax on Appellant's right of use and occupancy, as it was in the Michigan cases, *supra*, the tax was not levied on the federal property itself, as it was in *Allegheny County*. It is clear that *Allegheny County* does not prohibit an ad valorem tax as such, just because a federal property is involved, but that what is held improper is an attempt to tax the property itself by making the levy against a bailee. This Court there specifically reserved decision on the question of taxation of the "right of possession and use," and the propriety of such taxation was later affirmed in the Michigan cases.

### CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the Appellant presents no substantial federal questions for the decision of this Court, and that the appeal should be dismissed.

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,  
P. O. Box 473,  
Hereford, Texas,

*Attorneys for Appellee,  
Dumas Independent School  
District.*

APR 13 1959

JAMES H. B. ... Clerk

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

No. ~~303~~ 40

PHILLIPS CHEMICAL COMPANY, a Corporation,  
*Appellant,*  
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

*On Appeal From the Supreme Court of the State of Texas*

---

**BRIEF OF APPELLEE DUMAS INDEPENDENT  
SCHOOL DISTRICT IN SUPPORT OF ITS  
MOTION TO DISMISS**

---

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,  
Box 473,  
Hereford, Texas,  
*Attorney for Appellee,  
Dumas Independent School  
District.*

April 13, 1959

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1958

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**No. 769**

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PHILLIPS CHEMICAL COMPANY, a Corporation,  
*Appellant,*  
*v.*

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

---

*On Appeal From the Supreme Court of the State of Texas*

---

**BRIEF OF APPELLEE DUMAS INDEPENDENT  
SCHOOL DISTRICT IN SUPPORT OF ITS  
MOTION TO DISMISS**

---

Appellee, Dumas Independent School District, pursuant to Rule 35(1) of the Revised Rules of this Court, files this brief of additional authorities in support of its motion to dismiss the appeal in this case.

## I.

**THE CLASSIFICATION FOR TAX PURPOSES MADE  
BY THE STATUTE IN QUESTION IN THIS  
CASE IS NOT UNCONSTITUTIONAL**

It is axiomatic that all taxation involves classification. Virtually every case decided by this or any other court on the question of validity of a tax recognizes this fact, either expressly or by implication. Every imaginable type of tax is created and applied with reference to certain classes of people and things. In the income tax law, for example, one who earns less than \$600.00 per year pays no tax, and one who earns \$100,000.00 per year pays considerably more tax than one who earns only \$10,000.00 per year; up to the age of 64 years, an individual has only one personal exemption, but at age 65 he is granted an additional exemption; profit made on the sales of certain types of capital assets made within 6 months of acquisition are taxed in one way, while profits made on sales more than 6 months after acquisition are taxed in another way. The tariff laws consist mostly of classifications of different types of imported products, some of which are not taxed at all, and those which are taxed being taxed at many varying rates, determined upon considerations both economic, social, political, and diplomatic. Cigars and cigarettes are not taxed at the same rate. Different types and strengths of alcoholic beverages are taxed differently. Certain items such as furs and jewelry are considered luxuries, and a special tax is imposed on the sale thereof. Taxes and surtaxes, exceptions, deductions and exemptions,

the list could go on and on. The Internal Revenue Code alone demonstrates the massive complexity of classification, in the scheme of taxation, in order that the necessary revenues may be obtained to support our national, state and local governments. In this setting, the Appellant in this case argues that the tax laid on it by the State of Texas is based upon a classification so unreasonable and arbitrary as to deny to Appellant the equal protection of the laws and to deprive it of its property without due process of law, in violation of the Constitution of the United States. Appellee believes that the many cases decided by this Court approving classification for taxation in the various ways hereafter set forth demonstrate that Appellant's position is untenable, and that no substantial federal question is presented by this appeal.

One of the leading cases on the question of discrimination in State taxation and the limits imposed by the Fourteenth Amendment is the *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S. 232. The Court said that the Constitution does not prevent a State from adjusting its system of taxation in all proper and reasonable ways, and that an iron rule of equal taxation is not required. The Constitution is not intended to "render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance or vice, and which every state, in one form or another deems it expedient to adopt." All that is forbidden is the adoption of "clear and hostile discriminations against

particular persons and classes." The tax there upheld was levied against moneyed securities, which was computed upon the nominal, or par value of all bonds and other securities issued by corporations, but upon the actual dollar value of all other securities.

One of the keenest analyses of the question of classification for taxation, to be found is that of Mr. Justice McKenna in *Heisler v. Thomas Colliery Company*, 260 U. S. 245. The problem there was a tax on coal. It appears that there are two types of commonly used coal, anthracite and bituminous, and the State of Pennsylvania had classified them differently for tax purposes. Opponents of the tax laid upon anthracite coal only, contended that since both types of coal were fuels, they must necessarily be associated in the same class for taxation. The Court characterized this argument as being based upon a comparison of their similarities only, while ignoring the many differences between these two types of coal. The Court points out that in erecting classes, it is necessary not only to consider the properties of the things to be classified, but also to consider the purposes in view in erecting the classes. A plant may be classified one way by a farmer and another way by a botanist, and yet both classifications may be perfectly logical. It seems that the question then becomes one of determining not whether two things could logically be classed together, but whether, under any permissible purpose, they can be placed in different classes. The Court then points out the broad limits of permissible purposes for which objects can be classified for taxation,



recognizing that any fact which can be reasonably conceived of as having existed when the law was enacted will be assumed in order to justify the classification adopted. Thus, a court should not look for the similarities between objects differently classified, but should look for differences between them in order to see if any reasonable set of facts can be conceived of which will justify their having been classified differently.

The reasoning of the *Heisler* case is easily applied to the situation presented in the present case. Appellant would have the decision in this case turn upon the question of discrimination between classes, but Appellant would further define these classes itself, according to its own restricted definition. It would look to *Article 5248, Vernon's Annotated Civil Statutes* only, and it would find there a class of lessees of federally-owned property, and it would say that this class of persons is singled out for hostile and discriminatory tax treatment. In one class, it would say, are those persons who lease property from the federal government, and in another class are all those persons who lease any type of property, other than federal property, that would be exempt from taxation in the hands of the owner exclusively. Appellant would then argue that such classification is arbitrary, because all members of both classes lease property from tax-exempt owners. This is the similarity, but where are the differences?

In the first place, although the federal government may not be liable for taxes on its property (except by its own choice, and an express waiver of immunity), many of the

owners in the other class lose their exemption if the property is used with a view to profit, or if not used exclusively for the tax-exempt purpose. Thus, we must strike out some members of the second class, because of this essential difference, and there remains in the second class only public property owned by the State and its instrumentalities. Then, some of this public property must be stricken from the class, because the State of Texas has chosen to waive its own immunity in certain cases. For example, property of the State leased for a term of three years or more is subject to taxation. *Article 7173, Vernon's Annotated Civil Statutes*. County School lands are subject to taxation. *Article 7150a, Vernon's Annotated Civil Statutes*. University of Texas lands are subject to taxation. *Article 7150c, Vernon's Annotated Civil Statutes*. As we eliminate members of the second class, the creation of the first class becomes demonstrably less "arbitrary", since only by the erection of such a class could the members thereof be made to bear their fair share of the burdens being met by the properties that have been excluded from the second class.

Finally, however, we may arrive at a point where no more members of the second class can be eliminated, and there will still be properties exempt from taxation, with no statutory provision for taxation of the users or occupiers thereof. But even here, the legislature may not be deemed to have done an arbitrary or unreasonable thing, when it protects itself and its creatures from taxation without at the same time protecting the creatures of another sover-

eign. A State is entitled to foster its local interests and insure its revenues. *Ohio Oil Company v. Conroy*, 281 U. S. 116, 159. Reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is lawful. *Great Atlantic & Pacific Tea Company v. Grosjean*, 301 U. S. 112. A taxing act is not invalid because its exemptions are more generous than the State would have been free to make them by exerting the full measure of her power. *Hennickford v. Silas Mason Company, Inc.*, 300 U. S. 577.

Even, however, should it be considered that there is no reasonable basis for placing lessees of federal property in one class and lessees of state and local property in another class, for any of the above reasons, it should be a sufficient basis for the distinction to show that only the federal government is the owner of large industrial plants available for lease to private businesses.

All of the above argument, however, is based upon the proposition that the Appellant here has erected the proper classes, and this is not necessarily true. Under the circumstances of this present case, it seems more logical to erect two classes of users and occupiers of industrial plants, one class to contain those businesses which own their own plants or lease them from private owners, and the other class to contain those who lease their plants from the federal government, under the National Industrial Reserve program. In the first class, the user or occupier either pays taxes himself on his plant, or his landlord pays taxes on the plant and passes along the cost thereof in the way of

increased rent. *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466. The members of this class bear their share of the cost of government benefits, such as schools, roads, hospitals, police, and fire protection, and many others. The members of the second class, except for statutes such as the one under consideration in this case, do not pay their share of such costs. Thus, they receive certain benefits for which they do not pay, and in addition they are placed in a position of economic advantage over the members of the first class. Either of these situations should be sufficient basis for a difference in classification for tax purposes. *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799, affirmed, 355 U. S. 484.

Appellee believes that none of the above assumptions are idly made, but that all of them have a very real relation to the problem at hand. Appellee believes that this is the sense of the opinion in *Heisler v. Thomas Colliery Company*, 260 U. S. 245; and see the dissenting opinion of Mr. Justice Frankfurter in *Morey v. Doud*, 354 U. S. 457, 472.

The matter of propriety of classifications here becomes even more clear when viewed in the light of *Oliver Iron Mining Company v. Lord*, 260 U. S. 245. The tax in that case was upon the business of mining iron ore, and the tax was based upon the amount of ore mined, less the amount of royalties paid by the operators and tax payers. It was complained that inequality would result from the fact that some mine operators were lessees and paid

royalties, while others were owners of the mines and paid no royalties. The Court pointed out that under the record in the case, there were only six mines in the state operated by the owners, and that none of these mines had been operated during the year in question, so that no discrimination in fact resulted, and the question was not subject to being raised. Thus, in the present case, there is no showing that any lessee in an industrial plant in the State of Texas is in any more favored position than the Appellant here, as there is no showing that any industrial plant in this state is leased to a private business for profit without either the lessee or the lessor paying taxes thereon.

An important consideration in measuring the power of a state to tax, within the framework of the Federal Constitution, is the matter of the extent of state sovereignty and control over the subject of taxation. In other words, the incidence of the tax will be measured against the benefits, protections, and privileges granted by the taxing authority. *State of Wisconsin v. J. C. Penney Company*, 311 U. S. 435. The basic principle that the power to tax is an incident of sovereignty, and is co-extensive with that sovereignty, and includes all subjects over which the sovereign power of a state extends, is as old as the question of the constitutional limits on state taxing power. *McCulloch v. The State of Maryland*, 4 Wheat 316, 429. While this case is most often cited for the proposition that a state cannot tax the instrumentalities of the national government, yet it must always be remembered that this case

also held that there is no constitutional prohibition against the states' taxation of the real property of a national bank, in common with other real property within the state, nor to taxing the interest that citizens of the state may hold in the national banking institutions. When the operations of Appellant in this case are considered as being within the control of the State of Texas, just as are the operations of any other manufacturing concern, then it should be seen that the sovereignty of the state extends to the right to tax these operations. *International Harvester Company v. Wisconsin Department of Taxation*, 322 U. S. 435.

The question of collateral political and economic motives underlying a tax classification statute was the principal emphasis in *A. Magnano Company v. Hamilton*, 292 U. S. 70. The State of Washington had levied an excise tax of 15c per pound on butter substitutes, and it was argued that this tax constituted an arbitrary and illegal discrimination against such products, and that the tax was not levied for a public purpose but for the sole purpose of burdening or prohibiting the manufacture and sale of oleomargarine, in aid of the dairy industry. The Court held that except in rare and special instances, the due process of law clause is not a limitation upon the taxing power of the states; and that a tax is prohibited by such clause only if it is so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effort, the direct exertion of a different and forbidden power. The Court further held that the collateral purposes or motives of a legislature in levying



a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry, and that a tax within such lawful power may not be stricken down by the courts merely because its enforcement may or will result in restricting or even destroying particular occupations or businesses. The tax will not be stricken down unless its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise, under which there was exercised, in reality, another and different power denied by the Federal Constitution to the state.

A penetrating analysis of the question of legislative power to tax is found in the opinion of Mr. Justice Cardozo, in *Burnet v. Wells*, 289 U. S. 670, with particular reference to the paragraph beginning near the end of page 677. The Court there quoted from the opinion of Mr. Justice Holmes in *Corliss v. Bowers*, 281 U. S. 376, 378: "Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." The Court states that in order to be liable for a tax, the taxpayer does not have to enjoy all of the privileges and benefits by the most favored owner at a given time or place, that the Government is not confined by the traditional classification of interests or estates, and that it may tax not only ownership, but any right or privilege that is a constituent of ownership. In determining whether or not a legislature has levied an arbitrary tax, some margin is allowed for the play of legislative judgment, and a tax will not be

deemed arbitrary and unconstitutional unless the burden laid is unrelated to privilege or benefit.

It is settled that a tax may be levied upon less than the full ownership of property. *Burnet v. Wells*, 289 U. S. 670. Thus, the gift tax provisions of the Internal Revenue Code have been sustained upon the theory that a tax may be levied upon a particular use of property or the exercise of a single power over property incidental to ownership. *Bromley v. McCaughn*, 280 U. S. 124. So, also, gasoline used in interstate commerce, and thus exempt from a direct tax, may be subjected to taxation upon the privilege of storing the same within a state. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249. The guiding principle laid down in *Burnet v. Wells*, *supra*, has been recently restated by this Court in *International Harvester Credit Corporation v. Goodrich*, 350 U. S. 537, 547.

For other cases, representative of the many cases which have held classification to be constitutional, under varying circumstances, and which cases offer guidance in determining the constitutional issues involved here, see the following: *The Home Insurance Company of New York v. New York*, 134 U. S. 594; *McHenry v. Alford*, 168 U. S. 651; *Maxwell v. Bugbee*, 250 U. S. 525; *Dane v. Jackson*, 256 U. S. 589; *Carmichael v. Southern Coal & Coke Company*, 301 U. S. 495; *Great Atlantic & Pacific Tea Company v. Grosjean*, 301 U. S. 412; *Henneford v. Silas Mason Company, Inc.*, 300 U. S. 577; *New York Rapid Transit Corporation v. City of New York*, 33 U. S. 573, and *Walters v. City of St. Louis, Missouri*, 347 U. S. 231.

## II.

## THE IMMUNITY OF THE UNITED STATES SHOULD NOT BE HELD TO EXTEND TO ITS LESSEE

Formerly, the principle of immunity stated in *McCulloch v. The State of Maryland*, 4 Wheat 316, based upon the proposition that the power to tax is the power to destroy, was carried to great lengths. Thus, the federal government could not tax the emoluments of a state office, *Collector v. Day*, 11 Wall. 113, and a state could not tax a federal officer, *Dobbins v. Erie County*, 16 Pet. 435. The whittling away of this immunity of private individuals, based upon their relationship to the sovereign, is traced and discussed in some detail by Professor Powell in his article, "The Waning of Intergovernmental Tax Immunities," 58 *Harvard Law Review* 633. In 1937, this Court finally approved the federal income taxation of the salaries of employees of state agencies, *Helvering v. Gerhardt*, 304 U. S. 405, and shortly thereafter allowed state income taxation of the salaries of federal officials, *Graves v. New York Ex Rel. O'Keefe*, 306 U. S. 466.

This trend toward withdrawing the sovereign immunity from those with whom the government deals has continued apace. See *State of Alabama v. King & Boozer*, 314 U. S. 1; *James v. Dravo Contracting Company*, 302 U. S. 134; *Silas Mason Company, Inc. v. Tax Commission of State of Washington*, 302 U. S. 186; and *Curry v. United States*, 314 U. S. 14. A thorough review of the decisions over the preceding ten or twelve years is found in *Oklahoma Tax*

*Commission v. Texas Company*, 366 U. S. 342, which case overruled prior decisions of the Court and held that a lessee for oil and gas of exempt Indian lands was not exempt from taxation on its interest as lessee, with reference to the state gross production tax. The philosophy of *Oklahoma Tax Commission v. Texas Company* seems clearly to have received the continuing approval of this Court to the present time. The appeal in this case asks the Court to reverse this trend, and to accord to Appellant, a private corporation, an immunity from taxation upon the ground that it is a lessee of the United States. Appellee submits that this should not be done.

An important case along the road to the recent decisions was *Helvering v. Mountain Producers Corporation*, 303 U. S. 376, which refused the protection of governmental immunity to income derived from a state oil and gas lease. While that case dealt with federal taxation of state instrumentalities, the Court did not limit its holding in that regard, and the language of the opinion is broad enough to cover taxation of any government-related private right. See *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466.

The immunity of the government has been held not to extend to those interested with it in a property, in several different circumstances. Thus, the right to appropriate water from a government lake is taxable. *Northside Canal Company, Ltd. v. State Board of Equalization*, 8 F. 2d 739 (D. Wyo.), reversed on other grounds, 17 F. 2d 55 (8th

*Cir.*), *Cert. denied*, 274 U. S. 740. Mining claims, consisting of the right to go upon government land for the purpose of prospecting and exploring for minerals, when legal title to the land is in the federal government, have been held taxable. *Forbes v. Gracey*, 94 U. S. 762; *Elder v. Wood*, 208 U. S. 226; and *Ickes v. Ginia-Colorado Development Corporation*, 295 U. S. 639. State taxation of a property has been upheld even where the legal title is still in the United States, under a contract of sale. *S. R. A. v. State of Minnesota*, 327 U. S. 558. The problem of "exclusive jurisdiction" is not present in this case (Tr. 68-69), so that there is no lack of power to levy state taxes. See *Surplus Trading Company v. Cook*, 281 U. S. 647.

The act of Congress which is relied upon by Appellee here as a waiver of any express or implied governmental immunity, *Act of August 5, 1947, ch. 493, 61 Stat. 774*, has been held many times to allow the application of any proper and valid state law levying a tax upon the interest of the lessee in federal property. This Court has expressly approved such taxation. *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253; and *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 351 U. S. 962, *d denying certiorari*, 225 F. 2d 473 (3rd Cir.). Such taxation has been upheld by numerous state courts. *Kirtland Heights, Inc. v. Board of County Commissioners of Bernalillo County*, 64 N. M. 179, 326 P. 2d 672; *Bragg Investment Company, Inc. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341; *Conley Housing Corporation v.*

*Coleman*, 211 Ga. 835, 89 S. E. 2d 482; *Meade Heights, Inc. v. State Tax Commission*, 202 Md. 20, 95 A. 2d 280; *State of Missouri v. Personnel Housing, I. c.*, Mo. 300 S. W. 2d 506; *Gay v. Jemison*, Fla. , 52 So. 2d 137. The only cases which have refused to uphold the state tax have been cases where, under applicable state laws, the interest of the lessee was not deemed subject to any state tax. *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794; *Squantum Gardens v. Assessor of Quincy*, Mass. , 140 N. E. 2d 482.

The most recent decisions of this Court have upheld state taxation of private interests, even when very closely associated with exempt interests of the United States. *City of Detroit v. The Murray Corporation of America*, 355 U. S. 489; *United States v. Township of Muskegon*, 355 U. S. 484; and *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466.

The above authorities clearly reflect two things: (1) A lessee of federal property may have such a private interest in the property as will support taxation; and (2) the fact that the federal government owns the fee title to property does not exempt a lessee from paying taxes on its private possessory interest in the property. Thus, in this case, where the tax is levied against the private ownership right of use and possession of the property, the tax is valid even though the fee simple title to the property is owned by the United States.



**CONCLUSION**

Appellee respectfully submits that its motion to dismiss should be granted, on the grounds that no substantial federal question is presented by the appeal.

Respectfully submitted,

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,

Box 473,  
Hereford, Texas,

*Attorney for Appellee,  
Dumas Independent School  
District.*

April 13, 1959

APR 1958  
JAMES R. GILKINSON  
No. ~~100~~ 40

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1958**

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**PHILLIPS CHEMICAL COMPANY, APPELLANT**

**v.**

**DUMAS INDEPENDENT SCHOOL DISTRICT**

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE OF  
TEXAS**

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**MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE  
IN OPPOSITION TO MOTION TO DISMISS**

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**J. LEE RANKIN,**

*Solicitor General,*

**CHARLES K. RICE,**

*Assistant Attorney General,*

*Department of Justice, Washington 25, D.C.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 769

PHILLIPS CHEMICAL COMPANY, APPELLANT

DUMAS INDEPENDENT SCHOOL DISTRICT

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF  
TEXAS

## MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO MOTION TO DISMISS

The United States believes that this case presents an important question of constitutional law involving federal-state inter-governmental tax immunity, resolved by the court below contrary to the principles enunciated by this Court last Term in *United States v. City of Detroit*, 355 U.S. 466. It therefore urges that the motion to dismiss should be denied, and that this Court should note probable jurisdiction.

1. In the *City of Detroit* case, *supra*, this Court, in sustaining the constitutionality of a Michigan tax upon tax-exempt real property used by private persons for profit, as applied to real property leased by

a private company from the United States, recognized that a state tax may be invalid "if it operates so as to discriminate against the Government or those with whom it deals" (355 U.S. at 473). It held, however, that the state tax there involved did not on its face discriminate against federal lessees, since it "applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain" (*Ibid.*). "Nor is there any showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed" (*Id.* at 474). See, also, *City of Detroit v. Murray Corp.*, 355 U.S. 489, 494.

In the instant case, however, the Texas law "is in fact administered to discriminate against those using federal property." For, with respect to non-federal lessees, the tax is imposed only on leases of more than three years' duration (which, under Texas law, do not include leases of that length which are unilaterally terminable on short notice), and is measured by the value of the leasehold, not of the entire fee. But appellant, as a lessee of the Federal Government, is taxed even though the lease is unilaterally terminable by the United States on 30 or 90 days' notice, and the tax is measured not by the value of the leasehold, but by the entire fee. This tax, therefore, is significantly different from the non-discriminatory Michigan taxes which the Court upheld last Term. We submit that the Supreme Court of Texas erred in sustaining its validity.

2. The question whether state and local governments may impose discriminatory taxes upon property which has been leased by the United States to private operators is a matter of continuing and substantial importance to the United States. The decision below sustains a state law which taxes lessees of the Federal Government more onerously than other lessees having the same property interests. Although the particular lease here involved does not require the United States to reimburse the lessee for the tax, the contrary situation exists with respect to other leases which are similarly subject to the same Texas tax. Furthermore, the decision below, if allowed to stand, inevitably would cause a significant reduction in the rental value of government property which is subject to such local taxation, as compared to other rental property. It sanctions the imposition of a greater tax burden upon "those with whom it [the Government] deals" (*City of Detroit* case, *supra*) than upon those whose leasehold interests are acquired from non-federal sources. A state, however, cannot impose a tax which "operates so as to discriminate against the Government or those with whom it deals" (*ibid.*).

#### CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

J. LEE RANKIN,  
*Solicitor General.*

CHARLES K. RICE,  
*Assistant Attorney General.*

APRIL 1959.

FILED

SEP 15 1959

JAMES R. BROWNING, Clerk

IN FILE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, A Corporation,  
*Appellant,*

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

On Appeal From the Supreme Court of the  
State of Texas

## BRIEF FOR APPELLANT

CLARK M. CLIFFORD

CARSON M. GLASS

1523 L Street, N. W.  
Washington 5, D. C.

RAMBURN L. FOSTER

HARRY D. TURNER

C. J. ROBERTS

THOMAS M. BLUM

C. REN BOYD

Phillips Building  
Bartlesville, Oklahoma

*Attorneys for Appellant,*

*Phillips Chemical*

*Company*

September 15, 1959



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 40

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PHILLIPS CHEMICAL COMPANY, A Corporation,  
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v.

DUMAS INDEPENDENT SCHOOL DISTRICT

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On Appeal From the Supreme Court of the  
State of Texas

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**BRIEF FOR APPELLANT**

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**OPINIONS BELOW**

The majority and dissenting opinions of the Supreme Court of Texas (R. 177-203) are reported at 316 S.W. 2d 382. The opinions of the Court of Civil Appeals for the Seventh Supreme Judicial District, sitting at Amarillo, Texas (R. 165-170, 172-174), are

reported 307 S.W. 2d 605. The District Court rendered no opinion; its judgment is set out at R. 38-48.

### **JURISDICTION**

The judgment of the Supreme Court of the State of Texas was entered on June 18, 1958 (R. 203-204). Appellant's timely Motion for Rehearing was overruled on October 22, 1958 (R. 205). The Notice of Appeal was filed on January 15, 1959, and the Jurisdictional Statement was filed on March 13, 1959. This Court noted probable jurisdiction on May 18, 1959 (R. 211). 359 U.S. 987 The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U.S.C. 1257(2).

### **STATUTE INVOLVED**

Chapter 37 of the Texas Session Laws, 1950, Fifty-First Legislature, First Called Session:

"An Act to amend Article 5248, Revised Civil Statutes of Texas, 1925, relative to the exemption of lands and improvements owned by the United States of America from taxation, so as to provide that all personal property located on said lands owned by private parties and all parts of said lands and improvements used and occupied by private parties shall be subject to taxation; providing a saving clause; repealing all laws and parts of laws in conflict; and declaring an emergency.

*"Be it enacted by the Legislature of the State of Texas:*

"Section 1. That Article 5248 of the Revised Civil Statutes of Texas, 1925, is hereby amended so as to hereafter read as follows:

“Article 5248.

“The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said land which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions.”

“Sec. 2. In the event that any section, subsection, paragraph, sentence, clause, phrase or wording of this Act shall be held invalid or inoperative, such holding shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares that it would have enacted such remaining portions despite such invalidity.

“Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

“Sec. 4. The fact that there is no adequate provision in the Statutes of this State providing for taxation of personal property located on lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of pri-

vate businesses and enterprises by persons, firms, associations of persons and corporations, and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted."

### QUESTIONS PRESENTED

Under the Constitution of Texas, school districts, such as Appellee Dumas Independent School District, are authorized to assess only ad valorem taxes, which become a lien upon the property.

The Supreme Court of Texas in this case has construed Chapter 37 of the Texas Session Laws, 1950, Fifty-First Legislature, First Called Session, as authorizing Appellee to assess against Appellant Phillips Chemical Company, a tax measured by the full fee value of the Federally-owned Cactus Ordnance Works leased to Phillips. The maximum tax assessable against lessees of non-Federal tax-exempt property is limited under Texas law to the value of the leasehold. Furthermore, under the Texas law no tax is imposed upon a lessee of non-Federal tax-exempt property where his lease is for less than three years. Under the decision below it may be that no tax at all is assessable against a lessee of non-Federal tax-exempt property regardless of the duration of his lease. The questions presented are:

1. Whether Chapter 37 is, as here applied, repugnant to the Constitution of the United States and in-



valid because it discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the Federal Government and infringes upon its sovereignty.

2. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary class legislation against lessees of Federal property.

3. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid because it taxes to Phillips certain property, which is owned, not by Phillips, but by the United States and on which the State, since Congress has not assented thereto, may not assess taxes.

### STATEMENT

During World War II the United States constructed in Moore County, Texas, a plant known as Cactus Ordnance Works. The Secretary of the Army, acting under the authority of the Act of August 5, 1947, C. 493, 61 Stat. 774, leased this plant to Phillips Petroleum Company effective August 16, 1948 (R. 52-78). The lease was later assigned to Appellant, Phillips Chemical Company (Phillips) with the Government's consent (R. 86-88).

The lease, which provided for an annual rental of approximately one million dollars and imposed other substantial obligations upon the lessee, was for a primary term of fifteen years (R. 52). However, the Government could terminate the lease unilaterally (a) upon thirty days' notice if the President or Congress



declared a national emergency (R. 72), and (b) upon ninety days' notice if the Government desired to sell the property (R. 72). Phillips has, at all times relevant hereto, occupied the property and used it to manufacture ammonia for use in commercial fertilizers. The United States is, and has been at all times, the sole owner in fee simple of the Ordnance Works.

In 1954, Appellee Dumas Independent School District, a political subdivision of the State of Texas, undertook to tax the Ordnance Works to Phillips for the years 1949 to 1954, inclusive. In accordance with usual ad valorem tax procedures, the local assessor assessed and placed the Ordnance Works upon the tax rolls in the name of Phillips Chemical Company as the owner of the property and the School District sought to collect from Phillips the taxes thus assessed (R. 92-102 [assessment forms]; 114, 117-119 [tax rolls]; 160-163 [tax statements]).

Phillips commenced a proceeding in the District Court of Moore County for a permanent injunction against the assessment and collection of such taxes and to have canceled the assessments on the tax rolls of the School District. Phillips alleged that there was no valid law or statute authorizing the imposition of these taxes; that the property was owned by the United States and was exempt from taxation; and that such taxation would take Phillips' property without due process of law and deny to Phillips the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. (R. 2-11)

After trial, the District Court denied the relief sought by Phillips for the period commencing March

17, 1950, the effective date of the statute here involved, Texas Session Laws, 1950, Chapter 37 (supra pp. 2-4) (R. 38-48).<sup>1</sup> The judgment of the trial court recited that beginning on March 17, 1950 for the tax year 1950, and for the subsequent tax years the Ordinance Works was subject to taxation by the School District and that Phillips had been legally assessed for such property because it had used and occupied it in its private capacity for profit as a business enterprise (R. 47-48).

The Court of Civil Appeals affirmed (R. 165-170)<sup>2</sup> as did the Supreme Court of Texas on writ of error. The Texas Supreme Court held that the 1950 Texas statute subjected Phillips to taxation for the full fee value of the Government-owned Ordinance Works and, as so construed, the statute was valid under the Constitution of the United States, as well as under the Constitution of Texas (R. 177-190). Three Justices dissented on the ground that under this construction the statute unconstitutionally discriminated against the United States and its lessees (R. 191-203). On Phillips' Motion for Rehearing (R. 204), an additional Justice joined in dissent (R. 194). The final decision of the Texas Supreme Court, therefore, sustained the validity of the statute by a narrow five to four vote.

<sup>1</sup> The court granted the relief with respect to the period prior to March 17, 1950, holding that neither the fee nor the leasehold interest was taxable to Phillips before such date (R. 38-47). There is no question here as to the validity of that action.

<sup>2</sup> Although it affirmed, the Court of Civil Appeals held that Phillips was subject to taxation only upon the value of its leasehold estate and that it was the leasehold estate which had been taxed by the School District.

## SUMMARY OF ARGUMENT

### I.

A. The unconstitutional discrimination inherent in Chapter 37 of the 1950 Texas Session Laws stems in the first instance from the fact that it is directed solely against lessees of Federal property. This is clear on the face of the statute and is expressly recognized by the School District. Since Federal lessees are thus the "obvious aim" of the 1950 statute, Chapter 37 constitutes special legislation against the Federal Government. For that reason without more it is unconstitutional. See *Miller v. Milwaukee*, 272 U.S. 713, 714-715.

B. The Michigan tax structure involved in the Michigan cases decided in the 1957 Term differs in critical respects from that of Texas. As a result, far from supporting the holding below, the established principles reaffirmed in these cases by this Court require a holding here that the Texas tax unconstitutionally discriminates against Federal lessees. The Michigan statute involved in *Borg-Warner*, by its terms and as administered, taxed equally every person using exempt property for private profit.

The Texas statute, however, segregates Federal lessees from lessees of other exempt property and requires them alone to pay a tax on the full fee value of the leased property. In contrast Texas does not impose any tax upon a lessee of other exempt property where his lease is for less than three years. Article

<sup>3</sup> *United States v. City of Detroit*, 355 U.S. 466 (*Borg-Warner*); *United States v. Township of Muskegon*, 355 U.S. 484 (*Continental Motors*); *City of Detroit v. Murray Corp.*, 355 U.S. 489.

7173.<sup>4</sup> Since this also includes leases for longer stated periods which may be terminated unilaterally by the lessor in order to sell the property, and since the United States in Phillips' lease had reserved such a right, no tax would be assessable against Phillips if its lessor were an exempt owner other than the United States. *Trammell v. Faught*, 74 Tex. 557. And even if Phillips' lease were not so terminable, Phillips still would be discriminated against since lessees of non-Federal exempt property for terms of three years or more are taxable solely on the value of their leasehold interests and not on the entire fee. Article 7174;<sup>5</sup> e.g., *Daugherty v. Thompson*, 71 Tex. 192.

C. 1. The fact that the States have generally been accorded wide powers of classification in administering their tax systems is irrelevant here. In none of the cases recognizing this power was there any occasion to balance the States' need for revenues against the equally essential need of the Federal Government for freedom in the discharge of its functions. On the other hand, the maximum State tax sanctioned by this Court upon persons dealing with the Federal Government has been that which bears equally upon others similarly situated because such even-handed taxation accords appropriate weight to the respective State and Federal interests.

2. Even if it were permissible to classify Federal lessees separately there is no reasonable basis here for such classification, particularly in light of Chapter 37's limited purpose of raising revenues. The substantial value of the Government's plant here involved does

<sup>4</sup> Vernon's Annotated Texas Civil Statutes.

<sup>5</sup> Vernon's Annotated Texas Civil Statutes.

not justify such classification. Chapter 37 extends to all Federally-owned property in Texas, large or small, valuable or not, which is leased to private enterprise.

The fact that the children of the lessee's employees attend local schools also is immaterial. Employees of lessees of other exempt property similarly have children attending local schools, yet their landlords neither make voluntary financial contributions for schools, as does the United States, nor are they or their lessees required to pay a tax comparable to that imposed by Chapter 37. At most, this purported justification would support the assessment of taxes equally upon all lessees of exempt property.

Nor is the classification supportable as a proper effort to foster local interests. Such fostering is inappropriate when, as here, it "trench[es] upon the prerogatives of the national government." *Ohio Oil Co. v. Conway*, 281 U.S. 146, 159. The States' natural tendency to favor local interests might very well obstruct the requisite freedom of the Federal Government to discharge its functions.

D. The Act of August 5, 1947, C. 493, 61 Stat. 774, under which the present lease was executed does not authorize heavier tax burdens upon Federal lessees. Section 6 of that Act and its legislative history show concern only with the alleviation of local financial problems and minimization of the economic advantages which in some cases accrued to Federal lessees. It is clear from the Hearings that Congress did not intend to sanction more onerous state taxes upon Federal lessees than those imposed upon others. This reading accords as well with the various Federal and State cases applying Section 6.



## II.

A. Chapter 37 is also unconstitutional for the further reason that it imposes an ad valorem tax upon Federal property. As in *United States v. Allegheny County*, 322 U.S. 174, the tax imposed by Chapter 37 is directly upon the Government property. Not only does Chapter 37 so impose the tax by its terms, but also by failing to specify who should pay the tax, the Texas Legislature made clear that its primary concern was with the property, both as the object of the tax and as the source of its payment.

Moreover, the tax must be an ad valorem tax before the School District may assess the taxes authorized by Chapter 37. The Texas Constitution in Article 7, Section 3, permits school districts such as Appellee to assess only ad valorem taxes, and in Article 8, Section 15, provides that such tax shall be a lien upon the property. Furthermore, Chapter 37 can only be accommodated in the Texas comprehensive tax system as an ad valorem tax and both the Texas Supreme Court and the School District so regarded it.

B. The tax imposed by Chapter 37 cannot be construed as a use tax comparable to the taxes involved in the Michigan cases. In *Borg-Warner* and *Continental Motors*, the taxes were personal obligations of the lessees and there were no liens on the property. And in *Murray Corp.*, the tax was upon the possessor of property and the statute could easily be amended to impose the tax for the privilege of using the property.

The fact that the Texas tax is a lien on the Ordnance Works not only serves to emphasize its ad valorem nature, but creates a serious interference with the ex-



ercise by the United States of its constitutional power with regard to its property in Texas.

## ARGUMENT

### I.

#### THE TAX UNCONSTITUTIONALLY DISCRIMINATES AGAINST THE UNITED STATES AND ITS LESSEES

##### A. Chapter 37 Is Invalid as Special Legislation Directed Solely Against Federal Lessees

Section 1 of Chapter 37 of the 1950 Texas Session Laws amended Article 5248 of the Revised Civil Statutes of Texas, 1925, to read as follows (see, *supra*, p. 3):

“The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; \* \* \* *provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions.*”<sup>6</sup>

Since, as the School District expressly recognizes, Chapter 37 above “applies only to users of Federally-owned, tax-exempt property” (Motion pp. 6-7)<sup>7</sup> the

<sup>6</sup> Italics are supplied throughout this Brief unless otherwise noted.

<sup>7</sup> For convenience, the School District's Motion to Dismiss will be referred to as “Motion” and its Brief in Support Thereof as “Brief.”

statute constitutes special legislation against the Federal Government and for this reason without more is unconstitutional. See *Miller v. Milwaukee*, 272 U.S. 713, where this Court held invalid a state taxing statute which it found was similarly directed primarily against the Federal Government. See, also, *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113.

In *Miller v. Milwaukee*, the Wisconsin Legislature had enacted a statute imposing a tax upon those dividends paid by a corporation to its stockholders out of income not taxable to the corporation. Finding that income from Federal bonds was the most conspicuous instance of such tax-exempt corporate income, the Court, speaking through Mr. Justice Holmes, struck down the tax as discriminatory against the Federal Government (272 U.S. 714-715):

"A system of taxation that applied to stockholders of all corporations equally might tax, we assume for purpose of argument, the stockholders of a corporation that had invested all its property in United States bonds. But it would be a different matter if the State selected such corporations, supposing a number of them to exist, and taxed their stockholders alone. \* \* \* A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim."

Inasmuch as Chapter 37 is explicitly aimed at Federal lessees, it follows *a fortiori* from *Miller v. Milwaukee* that this statute is similarly invalid. This is particularly so since the Texas taxing system leaves no room for the argument that the purpose of Chapter 37 was solely to place Federal lessees on a parity, tax-

wise, with lessees of other exempt property. Compare the explanation in *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 494-495 of *Macallen Co. v. Massachusetts*, 279 U.S. 620; cf. *United States v. City of Detroit*, 355 U.S. 466, 472, fn. 2. On the contrary, Chapter 37 imposes upon Federal lessees a heavier tax than that upon lessees of other exempt property under the Texas tax system. This more onerous tax burden results in further unconstitutional discrimination against the United States and its lessees and so constitutes an additional reason why the Texas statute is invalid.

**B. Chapter 37 Imposes a Heavier Tax Upon Federal Lessees Than Upon Lessees of Non-Federal Exempt Property**

In holding that the taxes imposed by Chapter 37 of the 1950 Texas Session Laws do not result in unconstitutional discrimination against Federal lessees, the Texas Supreme Court relied heavily upon the Michigan cases<sup>\*</sup> decided by this Court in the 1957 Term.

Notwithstanding the conclusion of the Texas Court that these cases "clearly uphold the validity of the taxes assessed by the School District against . . . [Phillips] since March 17, 1950 insofar as the Federal Constitution and laws are concerned" (R. 185), the only similarity between the Michigan cases and the present case is that the Michigan laws and the statute here involved require lessees of Federal property to pay taxes measured by the full value of the property leased from the United States.

There the similarity ends and the two taxing systems go their separate ways. Unlike the Michigan tax,

<sup>\*</sup> *United States v. City of Detroit*, 355 U.S. 466 (*Borg-Warner*); *United States v. Township of Muskegon*, 355 U.S. 484 (*Continental Motors*); *City of Detroit v. Murray Corp.*, 355 U.S. 489.

which applied equally to *all* lessees of tax-exempt property, the Texas tax imposes a heavier tax burden upon Federal lessees than upon lessees of tax-exempt property. It is this crucial difference between the taxing system of Michigan and that of Texas which not only vitiates any comparison between the cases but, under established principles reiterated in the Michigan cases, calls for a contrary conclusion here. In these circumstances, far from supporting the conclusion below, the Michigan cases require a holding in this case that the Texas tax is unconstitutionally discriminatory.

**1. The taxes involved in the Michigan cases applied uniformly to all lessees of exempt property**

In *Borg-Warner*, the leading Michigan case, this Court expressly reaffirmed the unbroken doctrine that a State's taxing laws cannot discriminate against the United States or private persons who deal or contract with it (355 U.S. at 473):

"It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316."

Although this Court went on to conclude that the Michigan statute did not discriminate against Federal lessees, it did so only after a careful examination satisfied it of the even-handed and non-discriminatory applicability of the tax there involved.

Thus, this Court noted that while Michigan law provided for the exemption from taxation of real property

<sup>9</sup> See, also, *City of Detroit v. Murray Corp.*, 355 U.S. 489, 494, 495.

"owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities" (355 U.S. at 473; see, also, *id.* note 5), the Michigan statute under attack subjected to taxation "every private party who uses exempt property in Michigan in connection with a business conducted for private gain." 355 U.S. at 473. In addition, the Court observed that there was no "showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed." 355 U.S. at 474. In these circumstances, the Court held that the tax was non-discriminatory and so valid.<sup>10</sup>

**2. Under Texas law, Federal lessees alone of all lessees of exempt property are required to pay taxes measured by the full fee value of the leased property**

In contrast to the taxes sustained in the Michigan cases, the Texas tax in this case does not operate equally upon all lessees of tax-exempt property. In Texas the property of the State and its political subdivisions are exempt from taxation as well as a vast host of private entities. See Texas Constitution, Article 8, Section 2; Article 11, Section 9; Vernon's Annotated Civil Statutes, Articles 7150, 7150d, 7150e,

<sup>10</sup> Mr. Justice Harlan expressed the same view in his separate opinion (355 U.S. at 507): " \* \* \* the state taxes here \* \* \* do not operate in a discriminatory fashion by so measuring the tax on use or activities as to impose an unequal tax burden on lessees or users of government property *vis-a-vis* lessees, users, or owners of other tax-exempt or nonexempt property."

<sup>11</sup> Except as otherwise noted, all Texas statutes referred to in this Brief are cited from Vernon's Annotated Civil Statutes.



1269k. Section 22. Under Texas law, no tax has ever been imposed upon lessees of property thus exempted where the lease was for a term of less than three years, or where the term of the lease is conditional and of uncertain duration.

Article 7173, the only statutory provision (other than Chapter 37) authorizing the taxation of leasehold interests, provides:

“Property held under a lease for a term of three years or more, \* \* \* belonging to this State or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law. \* \* \*

In the leading case of *Trammell v. Faught*, 74 Tex. 557, a county collector assessed taxes against lessees of tax-exempt State lands which had been leased to private parties for terms of six and ten years, subject, however, to the right of the lessor-State to terminate at any time in the event it should sell the lands. Despite the stated term of the leases, the Texas Supreme Court held that they could not be regarded as being “for a term of three years or more” within the meaning of Article 7173 in view of the State’s right to terminate at any time and that hence the lessees were not assessable for taxes thereon (74 Tex. at 558-559):

“The leases were conditional, subject to be determined at the will of the State, and we do not think the legislature intended that such uncertain interests in the land owned by the State should be the subject of taxation against the tenant. We do not think the contract under which appellant held the lands can be held to be a ‘lease for a term of three years or more,’ and unless it be such



a lease appellant is clearly not liable to taxation thereon."

This ruling has been settled law in Texas since 1889,<sup>12</sup> unchanged either by Court decision or by legislative action.

Under the rule laid down in *Trammell v. Faught*, Phillips' lease is also not one "for a term of three years or more" within Article 7173, since the Phillips lease similarly reserved to the lessor, the United States, the right to terminate it on ninety days' notice in order to sell the property. See, *supra*, p. 6.<sup>12</sup> Notwithstanding the fact that under these circumstances, no tax would be assessable against Phillips if its lessor were a tax-exempt owner other than the United States, the Texas Supreme Court nevertheless held that Chapter 37 authorized the School District to assess taxes against Phillips on the property it had conditionally leased from the United States. Therefore, the discrimination against Federal lessees in favor of lessees of other exempt property is evident on the basis of the terms of the leases alone. The decision of the Court below would subject a Federal lessee to taxation even though the lease would not be taxable as one "for a term of three years or more" if held by a lessee from the State or other non-Federal tax-exempt agency, corporation, or institution.

But the foregoing is only the beginning of the discrimination existing against the United States and its lessees in the State Court's decision. If Phillips' lease is to be regarded as one "for a term of three

<sup>12</sup> The United States, in addition, could also terminate Phillips' lease upon thirty days' notice in the event of a national emergency. *Supra*, pp. 5-6.

years or more" and subject to taxation as such, Phillips as the lessee of Federal property would still be at a tax disadvantage. The tax assessed by the School District and upheld by the Texas Supreme Court against Phillips is measured by the entire fee in contrast to taxes imposed upon comparable non-Federal lessees which are measured solely by the value of their leasehold.

This more limited tax upon lessees of non-Federal exempt property is predicated on the Texas Court's long-standing construction of Article 7174, the companion provision to Article 7173. Article 7174 provides in pertinent part:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

In *Daugherty v. Thompson*, 71 Tex. 192, the Texas Supreme Court, in rejecting an attempt to tax a long-term lessee of county school lands for the full fee value of the leased property, pointed out (71 Tex. at 200):

"The only law providing that a lessee shall pay taxes on leased property is found in article 4691, Revised Statutes [now Article 7173] which determines what leasehold estates shall be taxable.

"Subdivision 4 of article 4692, Revised Statutes [now Article 7174], can have application to no other leasehold estates than such as are made taxable by the preceding article, for in all other cases, in the absence of a statute directing to the contrary, the owner of the real estate must pay taxes on the entire value of the property whether leased or not.

"In cases to which article 4691 is applicable, it must be held that it was the intention of the Legis-

lature only to impose on the lessee a tax based on the value of the 'taxable leasehold estate' and not to impose upon him a tax based on a sum equal to the full value of the real estate. \* \* \*

While the Texas Court in *Daugherty v. Thompson* went on to hold that school land leases such as those there involved were exempt from taxation in any case (71 Tex. at 200-202), the Court's construction of Articles 7173 and 7174 has been accepted throughout the years as the leading authority on the scope and meaning of these Articles. This interpretation was shortly thereafter applied by the Texas Supreme Court to leases of other exempt property (see *State v. Taylor*, 72 Tex. 297; *Taylor v. Robinson*, 72 Tex. 364, 369; cf. *Trammell v. Faught*, 74 Tex. 557, 559) and has been followed since as settled law in Texas.

This tax, therefore, is significantly different from the non-discriminatory State taxes which this Court has previously upheld in the Michigan cases. It is discriminatory not only as to its application to agencies and legal entities, but also as to the measure of value applied.

The Supreme Court of Texas recognized the disparity in taxation described above resulting from the application of established Texas legal principles. It undertook to minimize this discrimination against the United States by brushing aside as "no longer controlling" both of the relevant statutes and all but one of the critical decisions (R. 188). In addition, it held that "all property owned by private individuals is subject to taxation when not used for a purpose covered by the exemption statutes, and is taxable for the full value of the property" (R. 187). By these devices

the Texas Court sought to find a basis for upholding this discrimination against Federal lessees at the expense of the State's own statutes and decided law.

This effort by the Texas Supreme Court is in vain. Not only is its attempted invalidation of its own statutes and cases plainly untenable but also, if binding upon this Court, this invalidation results in even greater discrimination against Federal lessees. See Appendix A, *infra*, pp. 1a-4a. Moreover, the uneven tax treatment accorded Federal lessees is not in fact equated in the form of rent or otherwise. See Appendix B, *infra*, pp. 5a-7a.

Thus, under the Texas taxing structure, there is none of the even-handed non-discriminatory taxation found by this Court to exist in the Michigan cases. By requiring Federal lessees to pay heavier taxes than those imposed upon lessees of non-Federal exempt property, Chapter 37 clearly fails to provide "equal burdens and equal privileges for those of corresponding or similar situations." Cf. *Township of Muskegon v. Continental Motors Corp.*, 346 Mich. 218, 223, affirmed, 355 U.S. 484. Under the Texas statute, not only are Federal lessees without special privileges but also they are at a distinct economic disadvantage as against lessees of other exempt property. Therefore, the Michigan cases do not support the judgment below, but, on the contrary, they require a holding that the Texas statute is unconstitutional.

### **C. The Texas Tax Cannot be Supported as a Proper Classification**

As further support for its conclusion, the Texas Court invoked the principle that the Federal Constitution does not require complete equality in taxation.



This was apparently to show that there is no constitutional bar to a State's subjecting persons dealing with the Federal Government to heavier taxes. In elaboration upon these arguments, the School District urges that there was a reasonable basis for classifying Federal lessees separately. In our opinion, as shown below, neither of these contentions has any merit.

**1. The States may not impose upon persons dealing with the Federal Government taxes heavier than those imposed upon other persons similarly situated**

The Texas Court cited the holdings of this Court in cases such as *Green v. Frazier*, 253 U.S. 233, and *Southwestern Oil Company v. State of Texas*, 217 U.S. 114, that the Constitution does not require strict equality in taxation and left to the States wide powers of classification in administering their tax systems. These holdings, while accurately reflecting the law in the areas in which they are applicable, have no relevance in the present case and so do not afford any support for the Texas Court's decision.

None of the long list of cases elaborately detailed by the School District on this point (see Motion pp. 10, 13-16; Brief pp. 2-12), in any way involve an attempt by a state to tax persons dealing with the Federal Government. Typically in these cases the individual attacking the tax is unquestionably subject to state taxation as a purely private person who is resident or doing business within the state. The attack is predicated solely upon the Due Process or Equal Protection Clauses of the Fourteenth Amendment. Out of deference to the States' needs for revenue and in order to give full scope to the States' sovereign exercise of their power to tax, this Court has understandably required only that the tax classifications evolved by the State

Legislatures have a reasonable basis related to the subject of the statutes. This Court has accordingly limited its invalidation of such classifications to those cases in which the classifications are arbitrary or invidiously discriminatory. See, *infra* pp. 27-28.

Such situations are a far cry from those presented when, as here, a State undertakes to tax persons dealing with the Federal Government. In this latter situation, the needs of the States for revenue do not stand alone, and the problem is not resolved solely with reference to the limitations imposed by the Fourteenth Amendment. Instead, when a State undertakes to tax those dealing with the Federal Government, its need for revenue clashes head-on with the equally essential need of the Federal Government to be free to perform its functions without restraint or interference by the States. See, e.g., *James v. Dravo Contracting Co.*, 302 U.S. 134, 150; *Helvering v. Gerhardt*, 304 U.S. 405, 416; *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 521-522.

In these circumstances the validity of the particular State tax has turned upon the difficult and delicate balancing of these conflicting needs. Furthermore, not only must consideration be given to the Fourteenth Amendment, but also to the Supremacy Clause and the implications of our Federal system under which two governments, National and State, operate at the same time and in the same territory. In view of this conflicting need of the Federal Government and the additional constitutional problems raised thereby, the cases relied on by the School District clearly do not furnish an answer to the issue here presented.

Although, as pointed out by the School District (Brief pp. 13-14), this Court in recent years has



shifted the balance of these conflicting needs so as to broaden the scope of permissible state taxation of persons dealing with the Federal Government, the maximum state taxes thus sanctioned have been those which bear equally and even-handedly upon others similarly situated. The balance has been struck at this point because it accords appropriate and equitable weight to respective State and Federal interests. On the one hand, by such taxation those dealing with the Federal Government are required to bear their equitable share of the costs of providing local service and are without the special advantages which might accrue from a tax exemption. On the other hand, such limited taxation keeps the interference with the Federal Government's performance of its functions to a minimum.

Because even-handed taxation accommodates both the Federal and State interests, this principle has been the touchstone throughout the waning of intergovernmental tax immunity. As the Court is aware, the retreat from the broad immunity doctrine was fostered by the Government in its brief filed in *James v. Dravo Contracting Co.*, 302 U.S. 134. There the Department of Justice, for the first time, urged the Court to discard economic incidence as a sufficient basis of itself to require invalidation of state taxation upon Federal contractors and instead "to permit those who contract with the Government to be subjected to the *normal tax burdens*" in recognition of the services and benefits furnished by the local government. See Brief for the United States as *Amicus Curiae*, in *James v. Dravo Contracting Co.*, No. 3, October Term 1937, at p. 3.

At the same time that the Government was urging the propriety of taxes upon Federal contractors which placed them in a parity taxwise with others similarly

situated, the Government drew a sharp line against the imposition of heavier and special burdens upon those who dealt with it:

"The tax which the State or the Federal Government imposes upon those who deal with the other must be nondiscriminatory if it is to be valid. Neither the Nation nor the State can be permitted to frame its tax laws with an eye to imposing *special* burdens upon the other. Such a tax would be hostile in purpose and intolerable in legal effect." (*id.* pp. 29-30; see, also, *id.* at pp. 3-4, 23, 25-26, 28). (Italics in original)

This Court has recognized the soundness of this position and has so drawn the line between permissible and prohibited taxation of those dealing with the Federal Government. In permitting state taxation upon those dealing with Government in the *Dravo* case (302 U.S. at 149, 158) and subsequent cases, the Court has uniformly stressed that the burden of the tax being sanctioned was no greater than that imposed upon others in comparable situations.<sup>13</sup> Thus, in *Helvering*

<sup>13</sup> We do not mean to imply that this Court had not previously been alert to possible discrimination against persons dealing with the Federal Government. To the contrary, although prior to *Dravo* the criteria governing the scope of the intergovernmental tax immunity doctrine were different, the Court nevertheless repeatedly noted and stressed the necessity that the taxes be nondiscriminatory in order to be permissible under the Constitution. See, e.g., *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523-524; *Willcuts v. Bunn*, 282 U.S. 216, 225, 226, 227, 229; *Group No. 1 Oil Corp. v. Bass*, 283 U.S. 279, 282; *Pacific Co., Ltd. v. Johnson*, 285 U.S. 480, 493, 494, 495, 496; *Fox Film Corp. v. Doyal*, 286 U.S. 123, 131; *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U.S. 325, 327; *Burnet v. A. T. Jergins Trust*, 288 U.S. 508, 514; *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 23; *Taber v. Indian Territory Illuminating Oil Co.*, 300 U.S. 1, 3, 4, 5.

*v. Mountain Producers Corp.*, 303 U.S. 376, the Court emphasized that "where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits *on the same basis as others* who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote" (at pp. 386-387).

In the same vein the Court in *Helvering v. Gerhardt*, 304 U.S. 405, ruled that discrimination is "in itself a sufficient ground for holding invalid any form of state taxation adversely affecting the use or enjoyment of federal instrumentalities" (at p. 413). The Court then sustained the Federal tax upon income of employees of the New York Port Authority, pointing out that, not only do these taxpayers enjoy the benefits and protection of the laws of the United States and are under a duty to support that Government, but also that (304 U.S. at 420):

"A non-discriminatory tax laid on their net income, *in common with that of all other members of the community*, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system."

See, also, *Graves v. New York ex rel O'Keefe*, 306 U.S. 466, 480, 487; *Alabama v. King & Boozer*, 314 U.S. 1, 8; *Curry v. United States*, 314 U.S. 14; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 343, 362, 363; cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584; *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 269.

As these cases, as well as the recent Michigan cases (see, *supra* pp. 15-16), make clear, the Court has consistently required tax equality for those dealing with the Government and has not sanctioned heavier taxes for any reason. Thus, Government contractors and lessees are to be treated, from a tax point of view, no differently from others similarly situated; just as they do not have any constitutional right to be favored by tax exemption or lighter taxes, so also they may not be discriminated against by being required to bear a heavier tax burden.<sup>14</sup> Since the 1950 Texas statute does impose such a heavier tax upon Federal lessees, it appears to us to be abundantly clear that our Federal system of government and the Supremacy Clause stand in the way of the validity of such a discriminatory tax classification.

**2. Assuming Federal lessees may be classified separately, there is no reasonable basis here for such classification**

Even if it were permissible to classify Federal lessees separately so as to impose a heavier tax burden upon them, the classification must have a reasonable basis in order not to violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Furthermore, as this Court has said, before a classification is considered reasonable, it "must rest upon some ground of difference having a fair and substantial

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<sup>14</sup> In the analogous area of interstate commerce, this Court has similarly permitted only nondiscriminatory taxes, i.e., taxes upon out of state business not heavier than those imposed upon their local counterparts, in order to preserve the freedom of interstate commerce prescribed by the Constitution. See, e.g., *Memphis Steam Laundry v. Stone*, 342 U.S. 389; *Nippert v. Richmond*, 327 U.S. 416; *Best & Co. v. Maxwell*, 311 U.S. 454; *Hale v. Bimco Trading Inc.*, 306 U.S. 375; *I. M. Darnell & Sons Co. v. Memphis*, 208 U.S. 113; *Walton v. Missouri*, 91 U.S. 275.

relation to the object of the legislation." See *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527; *Morey v. Doud*, 354 U.S. 457, 465-466 and cases there cited; cf. *Smith v. Cahoon*, 283 U.S. 553, 567; *Hartford S.B.I. & Ins. Co. v. Harrison*, 301 U.S. 459, 463.

Unlike the usual situation where the statute's purpose can be discovered only by inference, the 1950 Texas statute leaves no doubt that its objective was solely to raise revenue by taxing those who deal with the United States. In setting out the legislative justification for suspending the State's Constitutional Rule requiring bills to be read on three several days, that Act explicitly states in Section 4 that an emergency has been created by:

"[t]he fact that there is no adequate provision in the Statutes of this State providing for taxation of personal property located on lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of private businesses and enterprises by persons, firms, associations of persons and corporations; and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions \* \* \*"

Since the purpose of Chapter 37 is limited to raising revenue, the grounds for classification advanced by the School District appear to have no fair and substantial basis which would justify assessing heavier taxes against lessees of Federal-exempt property than those assessed against lessees of non-Federal exempt property.



In support of the discriminatory classification, the School District urges<sup>15</sup> that "the State of Texas does not own many millions of dollars worth of prime industrial plants that are required, by the demands of national security, to be maintained in a state of semi-readiness for arms production and that can best be kept in such status by being leased to private industry" (Motion p. 15; see, also, Brief p. 7). This argument is specious. In the first place, neither the intrinsic nor market value of the property involved could support such a classification. Although Texas and its political subdivisions may not own industrial plants reserved for national defense,<sup>16</sup> the State and its agencies do own and lease properties of even greater value. To cite the most outstanding example of such properties, as is generally known, the extremely rich and prolific oil and gas lands of Texas and its subdivisions are periodically leased for millions of dollars to private corporations. In the second place, the value of Federal and State property could not be the basis for the classification since on its face the Texas statute extends to all Federally owned property in Texas, large

<sup>15</sup> Unlike the School District, the Texas Court does not attempt to put forward any justification for classifying Federal lessees separately from lessees of non-Federal property.

<sup>16</sup> The fact that the Federal property involved is an industrial plant reserved by the Government in order to facilitate defense production in the event of an emergency seems to us to militate against, rather than to support, the School District's argument. Whatever might be the propriety of imposing heavier taxes upon other Federal lessees, the imposition of more onerous burdens upon lessees of such defense plants would appear to be peculiarly inappropriate for it hinders the Government in its program of being prepared to discharge its supreme function of defending the security of the Nation.



or small, valuable or not, which is leased to private enterprise. Consequently, the value of the property involved does not provide any basis, much less a reasonable one, for the attempted classification.

On another ground the School District claims that this discriminatory classification is reasonable. It contends that the United States as the lessees' landlord pays no taxes on the leased premises although these lessees employ labor and their employees have children who attend local schools (Motion p. 16; see, also, Brief pp. 7-8). Here again the argument is beside the point. First, there is nothing in Chapter 37 to indicate that its purpose was to raise funds for school use as distinct from general uses within the State.

Second, even if the objective of Chapter 37 were so limited, there would be no reason for requiring Federal lessees to pay heavier taxes than those imposed upon lessees of non-Federal exempt property. Congress has recognized the schooling problems created by the presence of its lessees' children and has authorized financial aid to local schools because of these children (20 U.S.C. 236, *et seq.*). Indeed, the School District has admittedly received substantial amounts of such Federal aid (R. 29-31, 34-35). In contrast, the landlords of lessees of non-Federal exempt property in Texas do not make comparable voluntary financial contributions nor are they required to pay any such taxes although their lessees similarly have employees whose children attend local schools. Moreover, since the taxing authority in Texas frequently is a political subdivision separate and distinct from the State or political subdivision receiving the full rental, the taxing authority receives no offset in rental to compensate for the lower

taxes paid by the lessees of such non-Federal exempt property.

The argument of the School District at most supports the assessing of the taxes imposed by Chapter 37 equally against *all* lessees of exempt property, as was done in the *Continental Motor* case quoted in this connection by the School District (see Motion p. 16). To accept the School District's argument as a justification for requiring the payment of heavier taxes by Federal lessees alone would mean, in the words of the Michigan court quoted by the School District (Motion p. 16), that a lessee of non-Federal exempt property "becomes specially privileged and notably favored over his local classmates." See, also, *Borg-Warner*, 355 U.S. at 474.

Finally, the School District argues that the classification is appropriate because it operates to "foster its local interests and insure its revenues" (Brief p. 7), and "within proper constitutional limitations, self-interests may provide sufficient grounds for distinction in tax treatment" (Motion p. 10). However, the very cases cited by the School District (*Ohio Oil Company v. Conaway*, 281 U.S. 146; *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522) do not support this contention and in fact dictate a contrary result.

In the *Ohio Oil* case the Court stated (281 U.S. at 159):

"When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests."

Since the local interests which the School District claims are fostered by Chapter 37 are being benefited at the expense and to the detriment of the Federal Government and those with whom it deals, it is obvious that such fostering is a prohibited "trenching upon the prerogatives of the national government."

Similarly, in *Allied Stores*, the fostering of local interests permitted by this Court occurred in a situation where the classification imposed a heavier tax burden upon certain residents as against non-residents. In upholding this classification, the Court distinguished *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, where in a reverse situation, i.e., the heavier tax burden was upon non-residents as against residents, the tax had been held invalid. Concurring in *Allied Stores*, Mr. Justice Brennan commented (358 U.S. at 533):

" \* \* \* The proper analysis, it seems to me, is that *Wheeling* applied the Equal Protection Clause to give effect to its role to protect our federalism by denying Ohio the power constitutionally to discriminate in favor of its own residents against the residents of other state members of our federation. On the other hand, in the present case, Ohio's classification based on residence operates *against* Ohio residents and clearly presents no state action disruptive of the federal pattern. There is, therefore, no reason to judge the state action mechanically by the same principles as state efforts to favor residents." (Italics in original)

This analysis, we believe, is particularly applicable here. Appellee admits (Motion p. 10) that "[n]aturally the self-interest of the State, for itself and its creatures, causes it to be more concerned for its own exemptions than for those of other entities \* \* \*." This Court has

long been aware of this natural tendency of the States to foster self-interests and has been alert to counteract it in the interstate commerce field in order to protect "the great constitutional purpose of the fathers in giving to Congress the power 'To regulate Commerce with foreign Nations and among the several States' ". *Nippert v. Richmond*, 327 U.S. 416, 425; see, also, cases cited *supra* p. 27, fn. 14. Since our Federal pattern would appear to be of equal if not greater importance than local considerations affecting interstate commerce the Federal Government similarly should be free to exercise its constitutional functions. Therefore, the fostering of local interests plainly cannot be sanctioned as a justification for imposing discriminatory taxes upon those dealing with the Federal Government when those similarly situated who deal with the State pay less taxes or no tax at all.

**D. The Act of August 5, 1947 C. 493, 61 Stat. 774,<sup>17</sup> Does Not Authorize the Imposition of Heavier Tax Burdens Upon Federal Lessees**

The School District further argues that Chapter 37 is free from constitutional infirmity by contending that the tax immunity of the United States does not extend to its lessees (Motion p. 11) and even if it did, Congress has waived this immunity by the Act of August 5, 1947 C. 493, 61 Stat. 774 (Motion pp. 11-12; Brief p. 15). This argument has no validity upon examination of the Act. Although Section 6 of the 1947 Act permits the States to subject Federal lessees to local taxation, there is nothing in that Act, its legislative history or

<sup>17</sup> It was under the authority of this Act that the Cactus Ordinance Works was leased by the Secretary of the Army to Phillips' parent, Phillips Petroleum Company. See, *supra* p. 5.



any of the cases decided thereunder to justify the imposition of a disproportionate tax burden upon Federal lessees such as is here involved.

Section 6 of the 1947 Act reads as follows:

"The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

By merely providing for the taxation of Federal lessees' interests without more, Congress plainly manifested an intention to permit only that taxation which subjected its lessees to a burden no greater than that imposed upon others similarly situated. Since an even-handed tax best accommodates the local needs for revenue and the Federal Government's need for freedom in the exercise of its functions, if Congress intended to permit a more onerous tax upon Federal lessees it would certainly have explicitly enacted a provision to that effect. The absence of any such provision patently demonstrates that Congress had no such intention.

That Section 6 of the 1947 Act sanctions only non-discriminatory taxation of Federal lessees is further evident from its legislative history. The Committee Hearings in both the House and Senate show that the Congress was concerned with providing some alleviation of local financial problems and minimizing the economic advantages which might accrue to Federal lessees by virtue of the Constitutional tax exemption

of the United States Government.<sup>18</sup> At the same time there is nothing whatever in this legislative history to suggest that the Congress intended that Federal lessees should be required to bear more than their fair and equal share of the local tax burden or that they should be placed at an economic disadvantage with their State and local competitors. There appears to be no doubt that in passing the 1947 Act Congress was thinking solely in terms of nondiscriminatory taxation of leaseholds valued as such and never contemplated a disproportionate tax burden against the United States and its lessees.

The several cases cited by the School District in connection with the 1947 Act (Brief pp. 15-16) do not support its conclusion that Section 6 permits discriminatory taxation against Federal lessees. The cases cited (*Offutt Housing Co. v. County of Sarpy*, 351 U.S. 253 and *Fort Dix Apartments Corp. v. Borough of Wrightstown*, 225 F. 2d 473 (C.A. 3), *certiorari denied*, 351 U.S. 962) do not hold more than that Section 6 authorized local taxation upon a lessee's interest in housing constructed under the Wherry Military Housing Act of 1949.

The state cases which the School District also cites go no further. In contrast, the California Supreme Court, in ruling that there was no local law providing for the taxation of the interests of Federal lessees, pointed out (*General Dynamics Corp. v. County of Los Angeles*, 51 Cal. 2d 59, 66-67):

<sup>18</sup> See Hearings before Subcommittee No. 3 of the House Armed Services Committee, 80th Cong., 1st Sess., on H.R. 3471 at pp. 2353, 2354; Hearings before the Senate Armed Services Committee, 80th Cong., 1st Sess., on S. 1198 (H.R. 3471) at pp. 27, 28-32.



... \* \* \* To be valid a use or possession tax would have to apply to *all tax exempt property so as not to discriminate against the private use or possession of property owned by the United States*, and it is for the Legislature, not the court, to determine whether such a *nondiscriminatory* tax on possessory interests in tax exempt personal property should be adopted and to determine the measure of such tax."

Since Phillips is not claiming a complete exemption from State taxation, but rather that the State taxes imposed upon it as a Federal lessee must be nondiscriminatory, the Act of August 5, 1947 does not militate against Phillips' position. On the contrary, as we read that Act, it affirmatively supports this conclusion.

Therefore we submit that the tax imposed by Chapter 37 unconstitutionally discriminates against Federal lessees by requiring them to bear a tax burden heavier than that imposed upon lessees of other exempt property.

## II.

### **THE TAX IMPOSED IS AN UNCONSTITUTIONAL AD VALOREM TAX UPON FEDERAL PROPERTY ASSESSED AGAINST PHILLIPS**

In addition to the fact that the tax imposed is unconstitutional because it discriminates against Federal lessees, it is also invalid because it is an ad valorem tax levied against the property of the United States. Of fundamental importance to the determination of the nature of the tax here involved is an evaluation of the impact of the recent Michigan cases upon *United States v. Allegheny County*, 322 U.S. 174. See, also, *American Motors Corp. v. City of Kenosha*, 356 U.S. 21, affirming *per curiam* 274 Wis. 315. In the Michigan cases the Court distinguished *Allegheny County* and

reached a contrary result although the facts in the *Murray Corp.* case appear to be analogous to those in *Allegheny County*.

As we read these cases, there is no necessary inconsistency in decision or disagreement among the various Justices on basic principles.<sup>19</sup> Rather, the differences in result appear to stem from divergent views as to the legal incidence of the respective taxes involved. Thus in the Michigan cases the majority of the Court construed the taxes to be properly assessed against the persons using the Government property and the event giving rise to taxability was the use and enjoyment of the property. The taxes were held to be valid *use* taxes free from constitutional infirmities and the value of the property was merely a means of measuring the tax.

On the other hand, in *Allegheny County* a majority of this Court found that the Pennsylvania tax at issue was laid directly upon Federal property even though it was assessed against the person in possession thereof. The tax was accordingly held by this Court to be unconstitutional as an ad valorem tax. Since the tax imposed by Chapter 37 of the Texas Session Laws in this case is laid solely upon Federal property, the present case is controlled by *Allegheny County* rather than by the Michigan cases.

<sup>19</sup> In both *Allegheny County* and the Michigan cases the Court was agreed that "a State cannot constitutionally levy a tax directly against the United States or its property without the consent of Congress," 355 U.S. at 469; see, also, 322 U.S. at 177.

## A. The Incidence of the Texas Tax Is Upon Federal Property

1. Under the taxing system involved in Allegheny County, the tax was directly upon the property

In *Allegheny County*, certain machinery which the Government had leased to Mesta Machine Company to use in connection with Government contracts, had been bolted to the foundations of plants owned by Mesta. The local authorities, in assessing taxes against Mesta's real property, increased the amount of the assessment by the value of the Government machinery and the Pennsylvania Supreme Court sustained the tax as a valid tax upon Mesta's real estate (347 Pa. 191). In reversing, this Court noted (322 U.S. at 184-185):

"It is not contended that the scheme of taxation employed by Pennsylvania is anything other than the old and widely used ad valorem general property tax. This taxation plan involves the identification and valuation of the variable individual holdings to be taxed, commonly called the assessment, the application of a uniform rate calculated on the need for public revenues, and the collection, in default of payment, by distraint and sale of the property assessed and taxed. This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. \* \* \* In both theory and practice the property is the subject of the tax and stands as security for its payment.

"The Pennsylvania statutes embody this scheme of taxation. \* \* \* The basic provision reads: 'The following *subjects and property* shall \* \* \* be valued and assessed, and *subject to taxation*.' Taxes are 'declared to be a *first lien on said property*.' \* \* \* It is only under these legislative provisions that the tax in question is laid." (Italics in original)

Commenting further that the procedure followed by the assessors was "consistent with no other theory than that the machinery itself was being assessed and taxed exactly as land was being assessed and taxed" (322 U.S. at 185), the Court concluded that, notwithstanding the disavowal of any lien on the Government machinery (322 U.S. at 187), the tax was directly upon the Government machinery although assessed against Mesta and hence was unconstitutional.

Since the Texas tax, as we shall show, *infra* pp. 39-45, similarly is "simply and forthrightly imposed on the property itself, not on the privilege of using or possessing it" (*Borg-Warner*, 355 U.S. at 471), this tax, like that in *Allegheny County*, is an unconstitutional attempt to impose an ad valorem tax upon Federal property even though it is assessed against the lessee thereof.

**2. The Texas statute expressly imposes the tax upon the property itself**

The terms of Chapter 37 leave no doubt as to the incidence of the tax thereby imposed. The 1950 statute plainly indicates in its title, body and emergency clause that the tax was upon the Federal property itself and not upon the use thereof. Section 1 of Chapter 37 provides in pertinent part:

" \* \* \* any portion of said lands and improvements [i.e., held, owned, used or occupied by the United States] which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise shall be subject to taxation by this State and its political subdivisions."

Since the operative language is "*any portion of said lands* \* \* \* shall be subject to taxation by this State and its political subdivisions," it is clear that Chapter 37 by its express terms lays the tax directly upon Federal property. The intermediate "which" clauses are obviously restrictive and are intended solely to define the categories of Federal property which the statute seeks to subject to taxation. This restriction was necessary since Article 5248, prior to its amendment by Chapter 37, recognized the general and all inclusive exemption of Federal property from state taxation. Consequently, the "which" clauses serve merely to segregate the Federal lands and improvements being taxed from the Federal lands and improvements which continue to remain exempt under the law as amended.

The Texas tax is an ad valorem tax upon property. The statute contains no provision specifying the rate of taxation or who should pay the tax. By failing to designate the taxpayer, the Texas Legislature clearly manifested its primary concern to tax the property. Since such a tax has all the characteristics of an ad valorem tax and accords in all respects with the Texas ad valorem tax system (see, *infra* pp. 41-42, 8a-10a), it is apparent that the Texas Legislature intended that Chapter 37 be a part of that tax system. The attempt of the Texas Supreme Court to alter the thrust of Chapter 37 by speculating that the Legislature meant to tax only a lessee of the United States and not the United States does not obliterate the fact that the Legislature was thinking solely in terms of ad valorem taxes and it intended to impose the tax upon the property as was customary in Texas. Indeed, as will be



shown below, use taxes as such are foreign to the Texas taxing system.

**3. This construction of Chapter 37 is required by the Texas Constitution and accords with the Texas taxing system**

Although the Texas Constitution permits the Legislature to impose taxes other than ad valorem taxes (see Texas Constitution, Article 8, Sections 1, 17); school districts such as Appellee may assess only ad valorem taxes. The Texas Constitution, Article 7, Section 3, provides in pertinent part:

“ \* \* \* the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public school or schools of such districts, \* \* \* and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts \* \* \* for the further maintenance of public free schools, and for the erection and equipment of school buildings therein; provided that a majority of the qualified property taxpaying voters of the district voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year one (\$1.00) dollar on the one hundred dollars valuation of the property subject to taxation in such district, but the limitation upon the amount of the school district tax authorized herein shall not apply to incorporated cities or towns constituting separate and independent school districts, nor to independent or common school districts created by general or special law.”

See, also, Texas Constitution, Article 7, Section 3a; *Crabb v. Celeste Independent School District*, 105 Tex. 194; Fielder, *The Texas Tax Structure*, 20 Vernon's Annotated Civil Statutes, pp. vii, xxx-xxxi (hereafter



cited as Fielder). Since the School District's taxing power is limited by the State Constitution to ad valorem taxation, the tax imposed by Chapter 37 must perforce be an ad valorem tax before the School District under the Texas Constitution may lawfully assess the taxes.

Furthermore, although the Texas Legislature is empowered by the Texas Constitution to assess taxes upon persons for the use of property owned by others, it has not in practice imposed any such tax. See Fielder, *passim*. Consequently, should Chapter 37 be construed as imposing such a use tax, it would stand virtually alone in the Texas taxing structure. In contrast, the Texas Legislature has over a period of years provided a complete and comprehensive system for assessing and collecting ad valorem taxes. Significantly, under this system not only is the tax laid upon the property and assessed against the owner thereof as distinct from the person in possession, but the ad valorem tax becomes a lien against the property upon which it is laid and the property is primarily looked to for payment of the tax.

The Texas Constitutional provisions and statutory enactments relating to the prevailing ad valorem system of taxation are discussed in detail in Appendix C, *infra*, pp. 8a-10a. Under Texas Constitutional law a tax of the nature assessed here becomes a lien on the property immediately. This is inconsistent, of course, with any argument that the tax assessed against Phillips is a use tax and not an ad valorem tax. A use tax is not collectible by a property lien.

**4. Even the Texas Supreme Court and the School District construe Chapter 37 as imposing an ad valorem tax**

Examination of the opinion of the Texas Supreme Court reveals that it actually regards Chapter 37 as imposing an ad valorem tax and not a use tax upon the property leased to Phillips. Thus, at the same time that it sought to characterize the tax as one against the user or occupier of the property, the Texas Court explicitly agreed with Phillips' contentions that Chapter 37 applies to the property itself and makes the entire property interest subject to taxation (R. 180-181).<sup>20</sup> In addition, the Texas Court strengthens this agreement by reference to Article 8, Section 1, of the Texas Constitution which provides, in the Texas Court's own words, "for taxation of all property within the State in proportion to its value" (R. 181). Both this constitutional provision and the statutory provisions, Articles 7145 and 7146, to which the Texas Court also referred (R. 181), relate only to an ad valorem tax system. Compare *Allegheny County* quoted *supra* pp. 38-39. This is also true of the statutory provisions (Articles 7173 and 7174) and the cases which the Court below undertook to set aside in its opinion as being "no longer controlling" (R. 187-188) in an effort to meet Phillips' argument of unconstitutional discrimination.<sup>21</sup>

<sup>20</sup> Although the Texas Court sought to fit this case within the Michigan cases, at no place in its opinion did it explicitly describe the tax as a use tax assessed upon the privilege of using or holding that property. The furthest the Texas Court went was to say that the tax was assessed against the user or occupier of the property.

<sup>21</sup> The trial court's judgment was also cast in terms of ad valorem taxation. It states (R. 48):

• • • that such property is subject to taxation by the defendant, Dumas Independent School District, of Moore County,

Similarly, the School District itself has consistently read Chapter 37 as imposing an *ad valorem* tax. It manifested this construction administratively by following the usual *ad valorem* tax procedures in assessing and placing the Ordnance Works upon the tax rolls in the name of Phillips as owner thereof. The tax collector certified that upon refusal of Phillips to render the property for taxation, he had listed the property himself and assessed it in compliance with the State laws regulating the assessment of unrendered property (R. 92-102). See *infra* p. 9a. In addition, the various assessment sheets named Phillips as its owner<sup>22</sup> and described the property as the subject of the tax. See (R. 92, 94, 96, 97, 98, 99, 101).

Not only has the School District administratively read Chapter 37 as taxing the property itself, but it has so construed the statute throughout the judicial proceedings. Indeed, despite this Court's decisions in the Michigan cases, it has continued this construction as recently as its Motion to Dismiss. The School District in its Motion explicitly characterizes its proceeding as one involving "the *ad valorem* taxation by

Texas, as a political subdivision of the State of Texas, and that the same is taxable to Phillips Chemical Company for the years beginning March 17, 1950, and for the tax years 1951, 1952, 1953 and 1954, and that the property was duly and legally assessed for taxes to Phillips Chemical Company for said years beginning March 17, 1950."

<sup>22</sup> The collector had named Phillips Petroleum Company as owner (See, e.g., R. 92-93). However, before the Board of Equalization this was changed to name Appellant, Phillips Chemical Company, as owner (R. 107).

<sup>23</sup> The assessment sheets set out the appropriate land descriptions in detail. Since it appears so many times in the record and it is so lengthy, the parties have stipulated that the notation appearing in the assessment sheets as reproduced in the record (see e.g., R. 92) be substituted for the detailed description

appellee, a political subdivision of the State of Texas, of the lessee's interest in Cactus Ordnance Works \* \* \* " (Motion, p. 1).

### **B. The Texas Tax Cannot be Construed as a Use Tax**

Despite their recognition that Chapter 37 seeks to impose an ad valorem tax upon Federal property, both the Texas Supreme Court and the School District rely on the Michigan cases to sustain the Texas tax against invalidity in this respect. However, as shown below, there are fundamental differences between the Texas and Michigan tax structures which preclude a holding based on the Michigan cases that the tax imposed by Texas is a personal tax upon the privilege of using the Federal Government's property.

#### **1. The Borg-Warner and Continental Motors cases are not applicable**

In *Borg-Warner* and *Continental Motors*, the tax imposed by the applicable Michigan statute clearly was a personal obligation of the lessee of the property. As paraphrased by this Court, that statute provided in Section 1 that "when tax exempt real property is used by a private party in a business conducted for profit the *private party* is subject to taxation to the same extent as though he owned the property" (355 U.S. at 467).<sup>24</sup> Section 2 of the statute provided that "Such

<sup>24</sup> The Texas Court apparently was confused as to the taxable object of the Michigan statute as a result of the inadvertent omission from the Michigan statute of the subject of the sentence defining its object. Although the Michigan court and this Court had no difficulty in recognizing that the omitted language referred to the user of the property (see 355 U.S. at 467; 345 Mich. 601, 606), the Texas Court inserted "it" as the omitted subject, thus obviously interpreting the omission as referring to the property itself. (See R. 182).



taxes shall not become a lien against the property. When due, such taxes shall constitute a debt due from the lessee or user to the township \* \* \* for which the taxes were assessed and shall be recoverable by direct action of assumpsit." See 355 U.S. at 467, fn. 1. This Court construed these provisions as meaning that:

"Any taxes due under the statute are the personal obligation of the private lessee or user. The owner is not liable for their payment nor is the property itself subject to any lien if they remain unpaid. So far as the United States is concerned as the owner of the exempt property used in this case it seems clear that there was no attempt to levy against its property or treasury." (355 U.S. at 469)

The Court concluded therefore that the Michigan tax involved was not an ad valorem tax, but rather a personal tax upon the privilege of using the property.

The situations presented in these two Michigan cases were entirely different from that of the present case. Unlike these Michigan cases, the Texas tax imposed by Chapter 37 is clearly levied upon the property and not upon the persons using it. *Supra*, pp. 39-40. In addition, as stated before, the School District under the Texas Constitution is authorized to impose only ad valorem taxes and under the Texas law such taxes are a lien upon the property.<sup>25</sup> It is submitted, there-

<sup>25</sup> We realize, of course, that the School District could not in fact enforce such a lien upon the property of the United States. But the lien in *Allegheny County* did not even reach the Federal property involved, yet this Court held that tax to be upon the Government property although assessed to the lessee. See 322 U.S. at 187. Moreover, as pointed out by Mr. Justice Frankfurter in his separate opinion in the Michigan cases (355 U.S. at 504-505):

"Even a nondiscriminatory tax, if it is expressly laid on

fore, that the Court's holdings in the *Borg-Warner* and *Continental Motors* cases have no applicability here since the Texas and Michigan systems differ so radically.

## **2. The theory of the *Murray Corp.* case is also inapplicable**

While the situation in the *Murray Corp.* case (the third of the Michigan cases) appears to be closer to the present case than were the situations in the Michigan cases discussed above, there nevertheless are also significant differences which differentiate the *Murray* case from the one at bar. As the Court noted in *James v. Dravo Contracting Co.*, 302 U.S. 134, 150, the resolution of the intergovernmental tax problems requires "the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system."

The differences between the facts in *Murray* and those in this case are evident. In *Murray Corp.* the "taxes were assessed from the beginning 'subject to prior rights of the Federal Government,' " (355 U.S. at 492), and neither the United States nor its property could be held accountable for the tax in any event. On

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government property. ) is more likely to result in interference with the effective use of that property, whether because of an ill-advised attempt by the tax collector to levy on the property itself or because it is sought to hold the Government or its officers to account for the tax, even if ultimately the endeavor may fail. The defense of sovereign immunity to a suit against government officers for the tax, or a suit to assert title to or recover property erroneously levied upon to satisfy a tax, may in practice be an inadequate substitute for the clear assertion of federal interest at the threshold."



the other hand in this case the school tax was not assessed "subject to prior rights of the Federal Government," and, as shown previously, *supra*, pp. 39-40, the Texas tax law undertakes to destroy exemption from state taxation any Federal property not used exclusively by the United States. Moreover, not only is there no provision in the Texas law affirmatively relieving the Federal property from a tax lien, but under the Texas ad valorem tax system the School District must assess ad valorem taxes and these taxes plainly would constitute a lien on the Federal property.

The present case further differs from *Murray Corp.* in that the City of Detroit, the taxing authority involved, was empowered under state law to assess taxes against the party in possession of the property. As the Court stated (355 U.S. at 493):

"As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. *It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances.*"

Furthermore, since the City of Detroit could be authorized to assess use taxes as such, the Court concluded that the Michigan law permitting a tax on the possessor was sufficient to support a use tax by the taxing authority despite formal verbal omissions in the statutes. The Court stated that although

"\* \* \* the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, \* \* \* to strike down a tax on the possessor because of such verbal

omission would only prove a victory for empty formalisms \* \* \*. In the circumstances of this case the State could obviate such grounds for invalidity by merely adding a few words to its statutes." (355 U.S. at 493)<sup>26</sup>

In the present case, the Texas statutes do not empower the School District to impose taxes upon the *possessor or user* of property. *Infra*, pp. 8a-9a. Under the Texas taxing system, the tax is assessed against the owner. The School District here is without any authority whatsoever to assess use taxes. Under the Texas Constitution, the only taxes which the School District may assess and collect are ad valorem taxes. Thus, in Texas the differences between use and ad valorem taxes are not "empty formalisms" which "the State could obviate,\* \* \* by merely adding a few words to its statutes." In Texas, before the School District could assess use taxes, the Constitution as well as the taxing statutes would have to be amended. These differences, we believe, preclude the Court from holding here, as it did in *Murray Corp.* and *American Motors*, that the taxes imposed were use taxes upon the lessee for the privilege of using or possessing Federal property.

<sup>26</sup> The same situation prevailed in the Wisconsin case which the Court affirmed in a *per curiam* opinion. *American Motors Corp. v. City of Kenosha*, 274 Wis. 315, affirmed 356 U.S. 21. The statute there provided:

"Personal property shall be assessed to the owner thereof, except that when it shall be in the charge or possession of some person other than the owner or person beneficially entitled thereto, \* \* \* it shall be assessed to the person so in

### 3. The tax does not fit within the reservation in the Allegheny County case

In declining to apply *Allegheny County*, the Court in the Michigan cases pointed out that the question which it was there deciding, i.e., whether a bailee of Federal property could be taxed for his *use and possession* of that property, was expressly reserved in *Allegheny County*. See *Borg-Warner*, 335 U.S. at 471; *Murray Corp.*, 355 U.S. at 494. The School District seeks to invoke this reservation to distinguish *Allegheny County* from the instant case. According to Appellee, the present tax is an ad valorem tax upon Phillips' "right of possession and use" of the Federal property and hence is valid as within both the reservation in *Allegheny County* and the holdings in the Michigan cases (Motion pp. 18-19).

This characterization, however, is not only a contradiction in terms, but ignores the well-established differences between use and ad valorem taxes. In addition, the School District's argument overlooks the fact that this Court affirmed the taxes involved in the Michigan cases as *use* taxes, not as ad valorem taxes. Moreover, as shown, *supra*, pp. 39-40, Chapter 37 imposes the tax upon the property, not its use and possession, and in accordance therewith, the School District undertook to tax the property rather than its use. Viewed against the background of the Texas taxing structure, this case thus plainly involves "an attempt to tax the property itself by making the levy against a bailee." Such an attempt would come squarely within the holding and not the reservation in *Allegheny County*, as the School District admits in its Motion (p. 19).

**CONCLUSION**

For the foregoing reasons, it is respectfully submitted that Chapter 37 of the 1950 Texas Session Laws is unconstitutional and that the judgment of the Texas Supreme Court holding to the contrary should be reversed.

Respectfully submitted,

CLARK M. CLIFFORD

CARSON M. GLASS

1523 L Street, N. W.  
Washington 5, D. C.

RAYBURN L. FOSTER

HARRY D. TURNER

C. J. ROBERTS

THOMAS M. BLUME

C. REX BOYD

Phillips Building  
Bartlesville, Oklahoma

*Attorneys for Appellant,  
Phillips Chemical  
Company*

September 15, 1959

## APPENDIX A

**The Texas Supreme Court's attempt to nullify the settled principles for taxing lessees of non-Federal exempt property not only is untenable but, if effective, results in an even more disparate tax upon Federal lessees**

The ruling of the Texas Court that the cases of *Daugherty v. Thompson*; *Taylor v. Robinson*, and *State v. Taylor* (all cited *supra* pp. 19-20)<sup>1</sup> together with Articles 7173 and 7174 "are no longer controlling" (R. 188) is, as the School District apparently recognizes,<sup>2</sup> plainly untenable. The asserted foundation of this holding, i.e., that "State" school lands had been made taxable in 1927 (see R. 188), is clearly insufficient support for such a sweeping conclusion.<sup>3</sup> Article 7, Section 6a of the Texas Constitution, and Article 7150a (passed pursuant thereto) relied on by the Texas Court (R. 188) relate merely to those *agricultural* and *grazing* school lands owned by counties which were granted to them by the State (each county was given four leagues for educational purposes) and subject such lands to taxation for all but state purposes. Similarly limited is Article 7150c, also relied on below (R. 188); that

<sup>1</sup> The Texas Court did not, however, purport to set aside *Trammell v. Faught*, cited at *supra* pp. 17, 18.

<sup>2</sup> Far from espousing this action of the Texas Court, the School District has continued to treat at least Article 7173 and perforce Article 7174 as still fully operative. See Motion, pp. 9, 17; Brief p. 6.

<sup>3</sup> This Court's usual rule, that it will accept as binding State court rulings on questions of State law, is not without exception. One such exception occurs when the State Court undertakes to deny a Federal right by placing its decision on plainly untenable State grounds. See, e.g., *Ward v. Board of County Comm'rs*, 253 U.S. 17, 22; *Enterprise Irrigation Dist. v. Farmers' Mutual Canal Co.*, 243 U.S. 157, 164; *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 282-283.



Article concerns solely these lands owned by the University of Texas and subjects them to taxation for county purposes only.

Not only is the taxation authorized by those constitutional and statutory provisions narrow in scope, but the property thus subjected to taxation constitutes a very small segment of the vast properties, school or otherwise, owned by the State and its political subdivisions, which retain their full tax exemption. Since Articles 7173 and 7174 are provisions of general applicability and would determine the taxation of the lessees of those properties retaining their tax exemption, it is obvious that the constitutional and statutory provisions which the Texas Court invoked do not have the impact which it sought to accord them.

Likewise, the provisions relied on by the Texas Court are not broad enough to justify upsetting the cases construing Articles 7173 and 7174. While the *Daugherty* case dealt with county-owned school lands, the provisions cited by the Texas Court relate only to a portion of such lands, i.e., agricultural and grazing lands, with the other school lands owned by the counties continuing to retain their tax exemption. In addition, the provisions in no way relate to the kind of property involved in *Taylor v. Robinson* and *State v. Taylor*; the former concerned state capitol lands and the latter involved city waterworks property. In these circumstances, the constitutional and statutory amendments invoked by the Texas Court plainly could not operate to hold for naught either Articles 7173 and 7174, or the cases settling their construction.

The incongruity of the Texas Court's action is further highlighted by the facts that (1) Articles 7173,



and 7174 have been part of the Texas law since 1876; (2) the cases which the court below purported to set aside have been on the books since 1889; and (3) The Texas Legislature has reenacted in *hacce verba* the provisions of Articles 7173 and 7174 here involved in the several statutory revisions since that time.\* Thus, the Legislature has, in effect, accepted the judicial construction of the statutory provisions as an appropriate gloss thereon. 39 Tex. Jur. 266, Section 141; see, also, *Missouri v. Ross*, 299 U.S. 72, 75 and cases there cited; *United States v. South Buffalo R. Co.*, 333 U.S. 771; *Aper Hosiery Co. v. Leader*, 310 U.S. 469. In these circumstances and since there is nothing in the Texas Constitution authorizing the State courts to repeal or otherwise set aside valid statutes passed by the Legislature, the Texas Court's attempt to set aside Articles 7173 and 7174, together with their settled gloss, was highly improper.

In any case, if this holding of the Texas Court were to be accepted by this Court, the result is that the tax burden imposed upon Federal lessees by Chapter 37

\* The provisions of Articles 7173 and 7174 here pertinent were first enacted in Sections 23 and 24, respectively, of the Act of August 21, 1876. See General Laws of Texas, 1876, Chapter 157, Sections 23, 24. These provisions were incorporated in the Texas Revised Statutes, 1879, as Articles 4691 and 4692, respectively, and in the Texas Revised Statutes, 1895, as Articles 5087 and 5088, respectively. By the Act of March 31, 1905, (General Laws of Texas, 1905, p. 72), the Legislature amended the then Article 5087 (now Article 7173) by adding an extensive provision relating to the taxation of timber lands; that Act did not change the language of Article 5087 with which we are here concerned. The Texas Statutes were again revised in 1911 and in 1925, and the present Articles 7173 and 7174 were included in each of these revisions. See Texas Revised Statutes, 1911, Articles 7529, 7530; Texas Revised Statutes, 1925, Articles 7173, 7174.

is even more disproportionate. Articles 7173 and 7174 are the only State statutes (other than the 1950 Statute) providing for taxation of leasehold interests in tax-exempt property.<sup>5</sup> If these provisions are no longer controlling, such leaseholds are now free from taxation. Therefore, the only leases of tax-exempt property which under this ruling are now subject to taxation are those of property of the United States, and the disparity in tax treatment between lessees of Federal property and lessees of non-Federal tax-exempt properties is thereby widened even more.

<sup>5</sup> The School District appears to suggest (Motion p. 3) that these leaseholds would be taxable under Article 7146, which defines real property as including, in addition to land itself, "all of the rights and privileges belonging to or in anywise appertaining thereto." However, not only would this be a novel application of this Article but if so construed, the tax which could be imposed would be limited to the value of the lessee's interest. See *Bashara v. Saratoga Independent School District*, 139 Tex. 532; *Hager v. Stakes*, 116 Tex. 453, 472. In this connection, it is noteworthy that the Texas Court rejected such an argument in overruling the School District's claim for taxes which it had assessed against Phillips for the period prior to the enactment of Chapter 37.

## APPENDIX B

**Lessees of non-Federal exempt property do not pay an aggregate tax measured by the full value of the property**

As indicated *supra*, pp. 20-21, the Texas Court apparently sought to show that the tax imposed by Chapter 37 upon Federal lessees is not in fact more onerous than the total tax paid, directly and indirectly in the form of rent, by lessees using non-Federal tax-exempt property for profit. The result thus sought to be reached is predicated on the Texas Court's statement that "all property owned by private individuals is subject to taxation when not used for a purpose covered by the exemption statutes, and is taxable for the full value of the property" (R. 187).

Even assuming that the Texas Court's statement is valid as far as it goes and accurately reflects the Texas law as far as the leasing of privately-owned exempt property is concerned,<sup>6</sup> the fact remains—and even the Texas Court does not deny—that property owned by the State and its political subdivisions remains exempt even when leased for a non-exempt purpose. See, e.g., *City of Abilene v. State*, 113 S.W. 2d 631 (Tex. Civ. App.); *State v. City of Beaumont*, 161 S.W. 2d 344 (Tex. Civ. App.); *State v. City of Houston*, 140 S.W. 2d 277 (Tex. Civ. App.); *State v. City of San Antonio*, 147 Tex. 1; cf. *Daugherty v. Thompson*, 71 Tex. 194, 202. The result is that at the very least the lessees of such non-Federal exempt property are favored.

<sup>6</sup> It is not clear that this is correct formulation of the Texas law on this subsidiary point. The Texas Court referred to no cases so holding and contented itself with the bare citation of certain statutory provisions. Mr. Justice Calvert in his dissent indicated that in his view, the Court had misread these statutes. See R. 202.

tax-wise, over lessees of Federal property such as is here involved.

The School District attempts to minimize the extent of the resulting uneven tax treatment by reference to a number of specific situations wherein some taxes are permitted upon property owned by the State or its agencies which would otherwise be tax-exempt (Motion pp. 8-10; Brief pp. 5-6). Despite this effort, the maximum comfort which even the School District can derive from this listing is that "*much* of the property of the State and its agencies is subjected to *at least limited taxation*" (Motion p. 10). The School District, accordingly, is forced to admit that "the tax in this case does not operate equally upon all lessees of tax exempt property." (Motion p. 8).

Moreover, examination of the seven categories listed by the School District reveals that this unequal tax treatment is in fact, not as limited as the School District would like to have it appear. We have already discussed in other connections three of the situations listed by the School District and have shown that they do not make any substantial inroads into the vast tax-exempt properties owned by the State and its political subdivisions. See *supra* pp. 16-21, 1a-2a. Of the remaining four situations, two (Categories (1) and (7))

i.e., the subjection by Article 7, Section 6a of the Texas Constitution, and Article 7150a of agricultural and grazing school lands owned by counties to taxation except for state purposes; the subjection by Article 7150c of University of Texas lands to taxation for county purposes; and the taxation of leases of exempt property for terms of three years or more.

As to the latter, we have shown in considerable detail (*supra*, pp. 16-21) that the taxation there is measured solely by the value of the leasehold estate, not by the full value of the property and that the lessee is not required to pay any tax where the lease is for less than three years.



relate to privately-owned exempt property and hence are irrelevant at this juncture. The remaining two concern State owned prison properties and State owned farms employing convict labor. These latter situations are so narrow and specialized that they, too, fall far short of indicating any widespread taxation of property owned by the State or its agencies. Consequently, despite the School District's efforts, it is plain that the overwhelming percentage of the vast properties owned by the State and its political subdivisions remain tax-exempt even when leased for a non-exempt purpose.

In addition, even the taxation to which such property is subjected in these situations is also limited. In Texas, the authority to impose taxes is divided among the State and its various political subdivisions such as cities, counties, school districts, water districts and navigation districts. The withdrawal of the exemption of specific property owned by one from taxation by another means only that the property may be taxed only by the taxing authority specifically named with the property remaining free from taxation by the others. Thus, although the University of Texas lands may be taxed for county purposes, they retain their exemption from taxation by the other political subdivisions within whose bounds they are located. Since, in contrast, the effect of Chapter 37, as construed by the Texas Court, is to subject lessees of Federal property to taxation by all taxing authorities within whose jurisdiction the property is located, it is apparent that the tax burden upon such lessees is far heavier than the total of the taxes paid, directly and indirectly in the form of the rent, by lessees of property owned by the State or its agencies even in the limited situations where the ownership interest is subject to taxation by one or more of the taxing authorities.

## APPENDIX C

### The Texas Ad Valorem Tax System

Article 7145, the basic provision of the Texas system, provides:

"All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed."

All property subject to taxation which is owned or held on January 1 must be rendered for assessment between January 1 and April 30. Article 7151. The property is to be rendered by the owner or his agent; in cases of minors, insane persons, trusts, estates, and corporations, the renditions are made for the owner by others. Articles 7152, 7160.\* While the rendition of property may be by some one other than the owner, Article 7171 expressly provides:

"All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof."

At the time of rendition of the property, the owner is required to place a value for assessment upon each

\* Article 7160, captioned "Lasting for Others", states:

"Persons required to list property on behalf of others shall list it in the same manner in which they are required to list their own, but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs."



item.<sup>9</sup> If the assessor is satisfied with the valuation, he assesses the property on its list at that value. However, if he considers the value too low, he must place his own value on each item rendered and refer the matter to the local board of equalization for settlement. See Articles 7211, 7185. In addition, the assessor must by June 1 forward to the board of equalization all his lists, together with the valuation and assessment of property listed thereon. Article 7206. This board is under a duty to correct such assessments as necessary, to hold hearings and determine the proper assessments in cases of disputes and to equalize all assessments within the area subject to their jurisdiction. Articles 7206, 7211, 7212.

Taxes are payable on or after October 1 and become delinquent after the following January 1. Articles 7255, 7336. The Texas Constitution expressly provides in Article 8, Section 15:

“The annual assessment made upon landed property shall be a special lien thereon; and all property, both real and personal, belonging to any delinquent taxpayer shall be liable to seizure and sale for the payment of all taxes and penalties due by such delinquent; and such property may be sold for the payment of the taxes and penalties due by such delinquent, under such regulations as the Legislature may provide.”

\*When voluntary renditions are not made, the assessor is required to call upon each property owner in order to obtain a list of taxable property. Articles 7189, 7191. The assessor is further required to take the initiative and prepare a list of all property which is not rendered to him and assess it in the name of the owner or if appropriate in name “unknown”. Articles 7193, 7205, 7208.

As this provision makes clear, a tax becomes a lien upon real property immediately upon its assessment. See, also, Article 7172<sup>10</sup> and 7320. Should the taxes not be paid within six months after they become delinquent and the giving of appropriate notice to the owner, Article 7326 requires that suit be brought for judgment for the amount of the taxes and for a court order directing the sale of the property to satisfy the judgment.<sup>11</sup>

Viewed in the context of these constitutional and statutory provisions, it seems plain beyond any doubt that the tax imposed by Chapter 37 was an ad valorem tax on Federal property and not one upon the privilege of using or possessing that property.

<sup>10</sup> Article 7172 provides

"All taxes upon real property shall be a lien upon such property until the same has been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title."

<sup>11</sup> Personal property is subject to summary levy, seizure and sale for payment of taxes, but generally is not subject to a lien prior to such levy and seizure. Articles 7266, 7269.

**In the Supreme Court of the United States**

**OCTOBER TERM, 1959**

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**PHILLIPS CHEMICAL COMPANY, APPELLANT**

*v.*

**DUMAS INDEPENDENT SCHOOL DISTRICT**

---

**ON APPEAL FROM THE SUPREME COURT OF THE STATE  
OF TEXAS**

---

**BRIEF FOR THE UNITED STATES AS AMICUS  
CURIAE**

---

**J. LEE RANKIN,**  
*Solicitor General,*

**CHARLES K. RICE,**  
*Assistant Attorney General,*

**MYRON C. BAUM,**  
*Attorney,*  
*Department of Justice,*  
*Washington 25, D. C.*

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The Texas statute as here applied is unconstitutional in that it unlawfully discriminates against lessees of the United States

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1959

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No. 40

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PHILLIPS CHEMICAL COMPANY, APPELLANT

v.

DUMAS INDEPENDENT SCHOOL DISTRICT

---

*ON APPEAL FROM THE SUPREME COURT OF THE STATE  
OF TEXAS*

---

**BRIEF FOR THE UNITED STATES AS AMICUS  
CURIAE**

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## **OPINIONS BELOW**

The opinion of the Supreme Court of Texas (R. 177-203) is not yet officially reported. It is unofficially reported at 316 S. W. 2d 382. The opinion of the intermediate Texas court, the Court of Civil Appeals for the Seventh Judicial District (R. 165-170), is unofficially reported at 307 S. W. 2d 605. The District Court of Moore County wrote no opinion.

## **JURISDICTION**

The judgment of the Supreme Court of Texas was entered on June 18, 1958. (R. 203-204.) Ap-



pellant's motion for rehearing was overruled on October 22, 1958. (R. 205.) Notice of appeal was filed on January 15, 1959. (R. 205.) Appellant's jurisdictional statement was filed on March 13, 1959 and probable jurisdiction was noted on May 18, 1959. (R. 211.) The jurisdiction of this Court rests on 28 U.S.C., Section 1257(2).

### QUESTION PRESENTED

Texas assesses against those who lease property from the United States a tax measured by the value of the fee. It imposes no comparable tax upon other lessees of tax-exempt property.

The question presented is whether the taxing statute imposes an unconstitutional burden upon the United States and those with whom it deals.

### STATUTES INVOLVED

The pertinent provisions of Articles 7173 and 7174, Revised Civil Statutes of Texas, Chapter 37 of Texas Session Laws (1950), and Section 6 of the Military Leasing Act of 1947, are set forth in the Appendix, *infra*, pp. 13-15.

### STATEMENT

In 1948, the United States leased a Government-owned plant known as the Cactus Ordnance Works to appellant (Phillips Chemical Company) for a primary term of fifteen years. (R. 177.) The lease was entered into under the provisions of the Act of August 5, 1947, c. 493, 61 Stat. 774 (the so-called Military Leasing Act of 1947) and called for a nego-

tiated rental of about \$1,000,000 per year and the assumption by the lessee of other substantial obligations. (R. 52-77, 166-168, 178-179.) The lessor reserved the right to terminate upon 30 days' notice in the event of a national emergency and upon 90 days' notice in the event the United States wished to sell the plant. (R. 72, 167, 177.) During the period here involved, the lessee has utilized the plant to manufacture ammonia for use in commercial fertilizers. The record does not disclose that the lessee performed any supply contracts for the United States at the plant during the period here involved, nor is there anything in the record (other than the agreed rental) indicating what a private lessor could have obtained by renting similar property under like conditions.

In 1954, appellee, following the usual Texas ad valorem tax procedures, assessed taxes on the Cactus Ordnance Works against the appellant for the years 1949 to 1954 inclusive. (R. 177-178.) Phillips thereupon brought this action in the state courts for an injunction against the assessment and collection of the tax. (R. 177-178.) It alleged that the plant was fully owned by the United States and was therefore immune from state and local taxation, and that the taxation of the plant at its full value to Phillips violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. (R. 179.)

Following decisions adverse to Phillips in the lower state courts, the Supreme Court of Texas, on writ of error, upheld the tax as applied. Three justices

dissented on the ground that the statute unconstitutionally discriminated against the United States and its lessees. (R. 191-203.) On appellant's motion for rehearing, which the Supreme Court of Texas denied (R. 205), an additional justice joined those previously dissenting (R. 194). This appeal followed.

### ARGUMENT

#### **The Texas Statute As Here Applied Is Unconstitutional In That It Unlawfully Discriminates Against Lessees of the United States**

Problems involving the principle of inter-governmental (*i.e.*, federal-state) tax immunity were recently considered by this Court in *United States v. City of Detroit*, 355 U.S. 466, *United States v. Township of Muskegon*, 355 U.S. 484, and *City of Detroit v. Murray Corp.*, 355 U.S. 489, rehearing denied, 357 U.S. 913. Relying on these decisions, the courts below have upheld the statute here involved—a statute which is in terms directed exclusively to taxation of lessees of the United States. In our view, this reliance is wholly misplaced, for those decisions were rested upon the conclusion that the state taxing statutes involved were non-discriminatory. As we shall show, under Texas law lessees of other exempt property (*e.g.*, property owned by the state or by a charitable organization) would not be taxable at all when holding under a lease terminable (as here) on short notice. And lessees of such property holding under a long-term (three years or more) lease are taxable only upon the value of their leaseholds, not (as here).

upon the value of the entire fee. We believe accordingly that there is no escape from the conclusion that this taxing scheme is a discriminatory one repugnant to the Constitution of the United States.

***A. State taxing statutes may not discriminate against those who deal with the United States***

In *United States v. City of Detroit*, *supra*, this Court restated the basic principle, dating from *McCulloch v. Maryland*, 4 Wheat. 316, that the several states may not use their taxing power to discriminate against the Federal Government or those with whom it deals, declaring (355 U.S. at 473):

It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals.

See also *City of Detroit v. Murray Corp.*, *supra*, 355 U.S. at 494. Consistent with this principle, the Court, in each case, has examined the state tax sought to be imposed to determine whether it in fact discriminated against the United States or its contractors, and it has sustained the taxing scheme only when satisfied that no such discrimination resulted. *Helvering v. Gerhardt*, 304 U.S. 405, 413, 420; *Miller v. Milwaukee*, 272 U.S. 713; *McTeal & Eddy v.*

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\*It is assumed for purposes of this brief (although we believe the appellant's brief correctly demonstrates the contrary (pp. 36-50)) that the statute involved (Chapter 37 of the Texas Session Laws (1950), Appendix, *infra*, pp. 13-15) imposes a tax upon privileges held by federal lessees rather than a tax upon the federal property.

*Mitchell*, 269 U.S. 514. See also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480, 487; *Alabama v. King & Boorer*, 314 U.S. 1, 8; *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 312, 361-362.

The court below appears to have read *United States v. City of Detroit* and companion cases, as sustaining all taxes asserted against lessees of property owned by the United States. (R. 183-185.) It has overlooked this Court's conclusions that the state tax involved in *City of Detroit* did not on its face discriminate against federal lessees and that it was not discriminatorily administered. That tax, this Court observed (355 U.S. at 473), applied "to every private party who uses exempt property in Michigan in connection with a business conducted for private gain." The Court found no "showing that the tax is in fact administered to discriminate against those using federal property. To the contrary undisputed evidence introduced by appellees demonstrates that lessees of other exempt property have also been taxed" (*id.*, p. 474).

The Texas statute here involved "is in fact administered to discriminate against those using federal property." This discrimination, as we point out in the two succeeding sections of this brief (*infra*, pp. 6-9), has two aspects.

***B. Under Texas law, a non-federal lessee similarly situated is not subject to any tax***

The authority for the taxation of non-federal lessees<sup>2</sup> is found in Article 7173, 20 Vernon's Texas

<sup>2</sup>We use the term "non-federal lessee" as a shorthand expression to indicate that the lease involves exempt property which is not federally owned.

Revised Civil Statutes. (Appendix, *infra*, p. 13.) That Article states that property "held under a lease for a term of three years or more" which belongs to the State or is exempt by law from taxation shall be considered for tax purposes "as the property of the person so holding the same". In applying this statute, the Supreme Court of Texas has held that leases which run for more than three years, but are terminable at the option of the lessor upon short notice, do not constitute leases for "three years or more" within the purview of the statute. *Trammell v. Faught*, 74 Tex. 557. That case involved leases of state lands for periods in excess of three years, but the leases provided that the State as lessor could terminate at any time in the event of a sale of the lands. It was held that the leases were conditional only, since they could be terminated at the will of the State as lessor, and that hence they could not be deemed to constitute leases "for a term of three years or more". There is no indication that this case, decided in 1889, does not continue to represent the law of Texas. The courts below have not questioned its authority.

Under the standards set forth in *Trammell v. Faught*, *supra*, the lease to appellant must likewise be considered conditional, rather than a lease for "three years or more". The lease reserves to the United States, as lessor, an option to terminate at any time upon not less than ninety days' notice in order to permit the sale of the leased property, and it extends an additional option to the United States to terminate the lease at any time upon thirty days'



notice in the event of a declaration of a national emergency by the President or by the Congress. (R. 72.) Under Article 7173, as applied by the Texas courts, no tax whatever would be imposed if the property subject to such a lease were state-owned. Nonetheless, the court below has sustained the taxes imposed on appellant under Chapter 37 of Texas Session Laws (1950) (Appendix, *infra*, pp. 13-15), which provides for the taxation of lands of the United States used by a private person, firm, or corporation in its private capacity or used and occupied in the conduct of any private business or enterprise.

It is thus clear that in Texas there are two rules of law and that the determining factor as to which one controls is whether the United States is the lessor. A lessee under a short-term or a conditional lease is free from tax if he leases from the State or its instrumentalities or from a private charity. But he is subject to tax if he leases from the United States. To single out lessees of federal property in this fashion is plainly a forbidden discrimination.

*C. Under Texas law, a non-federal lessee is taxable at most upon the value of his leasehold, not upon the value of the fee*

Even if appellant's lease could be deemed a lease for three years or more within the meaning of Article 7173 (a conclusion which we believe foreclosed by *Trammell v. Faught*, *supra*), discrimination nonetheless results since the measure of the tax is substantially greater merely by virtue of the fact that the United States is the lessor. The tax here im-

posed is measured by the full value of the leased property. (R. 181.) Non-federal lessees, however, would come within the purview of Article 7174, 20 Vernon's Texas Revised Civil Statutes (Appendix, *infra*, p. 13) which provides that leaseholds shall be taxed "at such a price as they would bring at a fair voluntary sale for cash"—in other words, on the value of the leasehold interest as such.

It had long been held by the Supreme Court of Texas that the predecessors of Article 7174 did not permit the taxation of lessees of exempt lands for the full value of the leased property, but authorized only a tax based upon the value of the leasehold. *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor & Kelley*, 72 Tex. 297; *Taylor v. Robinson*, 72 Tex. 364; *Trammell v. Faught*, *supra*. As to lessees of federal property, however, Chapter 37 of the 1950 Texas Session Laws, as interpreted by the court below, requires a tax measured by the full value of the fee.

The opinion below suggests (R. 188) that Articles 7173 and 7174 are no longer operative. But if this be so, the discrimination against the lessees of federal property, far from being removed, becomes even more apparent. If Articles 7173 and 7174 are to be read out of existence, there is no statutory provision whatever authorizing the taxation of non-federal lessees. In that event, federal lessees would remain subject to tax on the full value of the fee, pursuant to the provisions of Chapter 37, while lessees of other exempt property would be subject to no tax whatever, irrespective of the duration of their leases.

**D. *Nothing contained in the Military Leasing Act of 1947 authorizes a discrimination against lessees of federal property***

Section 6 of the so-called Military Leasing Act of 1947 (Act of August 5, 1947, c. 193, 61 Stat. 41) (Appendix, *infra*, p. 15) provides that the interest of a lessee created pursuant to the provisions of that Act shall be subject to state or local taxation. Congress intended, to be sure, that lessees whose interests arise by virtue of the provisions of that Act shall not be exempt from state or local taxation, but could bear their fair share of local tax burdens. But it is obvious, without further elaboration, that this cannot be transformed into a consent that they shall be subject to unconstitutional discriminatory taxation.

**E. *The discrimination cannot be justified***

Appellee, not directly denying the existence of the discrimination, seeks to justify and to minimize it. In the brief which it filed in this Court in support of its Motion to Dismiss, it urged (pp. 6-7) that a state should be permitted to protect "itself and its creatures from taxation without at the same time protecting the creatures of another sovereign." It appears to claim a right to place a substantial tax upon federal lessees without placing any similar tax upon the lessees of a State or of its political subdivisions. But under the principles only recently stated by this Court in *United States v. City of Detroit*, *supra*, the mere fact that lessees of a state and its subdivisions are not taxed, while lessees of

the United States are, involves an invidious discrimination requiring invalidation of the tax.

Appellee also urges (*id.*, p. 7) that "only the federal government is the owner of large industrial plants available for lease to private businesses." Be this as it may, there can be no denying that the State and its subdivisions and private charities regularly lease valuable properties to private persons. Indeed, to the extent that the present tax is directed at large industrial plants owned by the United States for defense purposes, the constitutional infirmity of

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The program under which the plant here involved was leased was an integral part of a plan under which defense plants were to be kept in working condition so as to be available in the event of a national emergency. As the court below stated (R. 178-179):

After the end of World War II the United States Government had on hand a number of plants which it had constructed for the production of material and supplies needed to effectually wage that war. In order to keep these plants and equipment in working condition and available to the Government in case of another emergency it was decided, after careful study, to sell some of the plants to private operators with a "recapture" clause for the plants to be returned to the Government for a consideration; and to be operated by the purchaser solely under Government direction and control for the exclusive use of the Government in the event of another war or the declaration of an emergency. Certain other plants and equipment, which included "Cactus Ordnance Works" were to be leased by the Government to private operators with like provisions for Government control and operation in the event of another war or existence of an emergency; also provision was made in the leases authorizing the delivery of possession to the purchaser in the event the Government exercised its option to sell.

It may be noted that this lease was executed on July 22,

the statute is highlighted. The vital principle to which this Court has consistently adhered is that the functions of the Federal Government shall not be impaired, either directly or indirectly, by the imposition of discriminatory tax burdens.

### CONCLUSION.

Chapter 37 of the 1950 Session Laws of Texas, as here applied, unlawfully discriminates against the United States, its lessees and others with whom it deals. It is therefore repugnant to the Constitution of the United States. The judgment should be reversed.

Respectfully submitted,

J. LEE RANKIN,  
*Solicitor General.*

CHARLES K. RICE,  
*Assistant Attorney General.*

MYRON C. BAUM,  
*Attorney.*

SEPTEMBER, 1959.

1948 (R. 77), and that a further national emergency occasioned by events in Korea was proclaimed by the President on December 16, 1950. Proclamation No. 2914, 61 Stat. A151.

## APPENDIX

## 20 Vernon's Texas Revised Civil Statutes:

Art. 7173. *Leasehold interests in public lands.*

Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law.

Art. 7174. *Valuation of property for taxation.*

\* \* \* \*

Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash.

\* \* \* \*

Texas Session Laws (1950), Fifty-First Legislature,  
First Called Session, c. 37:

An Act to amend Article 5248, Revised Civil Statutes of Texas, 1925, relative to the exemption of lands and improvements owned by the United States of America from taxation, so as to provide that all personal property located on said lands owned by private parties and all parts of said lands and improvements used and occupied by private parties shall be subject to taxation; providing a saving clause; repealing all laws and parts of laws in conflict; and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*



Section 1. That Article 5248 of the Revised Civil Statutes of Texas, 1925, is hereby amended so as to hereafter read as follows:

"Article 5248.

The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said lands, which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

Sec. 2. In the event that any section, subsection, paragraph, sentence, clause, phrase or wording of this Act shall be held invalid or inoperative, such holding shall not affect the validity of the remaining portions of this Act, and the Legislature hereby declares that it would have enacted such remaining portions despite such invalidity.

Sec. 3. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Sec. 4. The fact that there is no adequate provision in the Statutes of this State providing for ~~taxation of personal property located on~~ lands belonging to the United States which are privately owned by persons, firms, associations of persons and corporations, and lands and improvements, although owned by the United States of America, which are used and occupied in the conduct of private businesses and enterprises by persons, firms, associations of persons and corporations, and the further fact that the funds being lost by reason of these properties escaping taxation are badly needed by the State and its political subdivisions create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage, and it is so enacted.

Act of August 5, 1947, c. 193, 61 S. 774 (The Military Leasing Act of 1947).

SEC. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, by such event the terms of the lease shall be renegotiated.

634 U.S.C. 1952, 61 S. 772

FILED  
OCT 14 1959

JAMES H. BROWNING, Clerk

In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1959

\_\_\_\_\_  
**No. 40**  
\_\_\_\_\_

PHILLIPS CHEMICAL COMPANY, a Corporation,  
*Appellant,*

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

\_\_\_\_\_  
*On Appeal from the Supreme Court of the State of Texas*  
\_\_\_\_\_

**BRIEF FOR APPELLEE**  
\_\_\_\_\_

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,  
Box 473,  
Hereford, Texas.

*Attorneys for Appellee,  
Dumas Independent School  
District.*

October 15, 1959.

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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1959

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No. 40

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PHILLIPS CHEMICAL COMPANY, a Corporation,  
*Appellant,*

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

*On Appeal from the Supreme Court of the State of Texas*

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**BRIEF FOR APPELLEE**

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**STATEMENT**

The statement of the case made by Appellant in its brief (pp. 5-7) is a fairly accurate and complete statement of the nature and results of this suit in the Courts below. In one important respect, however, Appellee disagrees with the manner in which Appellant has stated the case, and therefore presents this additional statement.

It is true that the underlying property involved in this case is a government facility in Moore County, Texas.

known as Cactus Ordnance Works. It is not true, however, that Appellee "undertook to tax the Ordnance Works to Phillips for the years 1949 to 1954, inclusive," or that the local assessor "placed the Ordnance Works upon the tax rolls in the name of Phillips Chemical Company as the owner of the property" (Brief, p. 6). Rather, what the school district undertook to tax to Phillips for such years, and what it placed upon the tax rolls for such years, was the interest that Phillips, as lessee, owned in and to such underlying property. The tax was laid upon such interest as Phillips had, its right to use and possession of the premises, arising out of its lease from the United States.

It is imperative that this crucial point be understood from the beginning, because much of the argument in Appellant's brief is based upon the proposition that the taxes involved were laid upon the property of the United States, rather than upon some private property interest owned by Appellant. It is true that in the trial, and in the proceedings leading up to the trial, not every reference to the "property" involved was crystal-clear on this point. But, regardless of any failure to specify with particularity, each and every time that some reference was made to the property, that only the lessee's interest therein was intended to be referred to, it is abundantly clear from the record that there was never any misconception on the part of either party hereto as to what property interest was intended to be taxed. For example, Appellant's Division Tax Manager testified at the trial, and he admitted that he knew, at all relevant times, that the school district was not

attempting to assess for taxes anything other than the interest of Appellant in the property. (R. 149.) Appellee's pleadings were clear and specific to the effect "that the property on which the taxes were assessed and levied, as herein set forth, is the leasehold interest of the Plaintiff in that property known as the Cactus Ordnance Works, fee title to which is in the United States." (R. 22.)

Further, while Appellee may differ with the manner in which Appellant has stated, in a single sentence each, the judgment and the holding of the Trial Court and of the Supreme Court of Texas, Appellee will not attempt to correct such statement, but will let the judgment and opinion of these Courts speak for themselves.

## SUMMARY OF ARGUMENT

### I.

A. Although the Texas Statute (*Acts 1950, 51st Leg., 1st C.S., p. 105, ch. 37, § 1, Article 5248, Revised Civil Statutes of Texas*) purports by its terms to apply only to users and occupiers of federal property for profit, and does not apply to "lessees" of other types of exempt property, it does not necessarily follow that the statute unconstitutionally discriminates against federal "lessees." The statute must be considered in its proper place as a part of the Texas tax laws as an integrated whole, and the tax position of Appellant must be considered with relation to the tax picture of users and occupiers for profit of other tax-exempt property in the State.

B. *Article 5248* is not a statute that taxes leaseholds in exempt property as such, and is not to be compared to *Article 7173, Revised Civil Statutes of Texas*, which would have been sufficient in itself to lay a tax on leaseholds in federal property, as well as in other exempt property. Rather, it is a statute designed to equate the tax burden of a user or occupier for profit of federal property with the tax burden carried by other businesses that compete with them but that use property subject to taxation, either because such property is not exempt from taxation at all or because it loses its exemption when used for profit. In the case of non-federal exempt property, the exemption is taken away, as it was given, by the legislature, when the property is used for profit; but the legislature can not take away the "immunity" of the federal property and it can equate the tax burdens of users and occupiers of exempt property only by taxing the property right of use and occupancy in those properties that it can not tax directly. Appellant has not shown in this case that any business in Texas that conducts its business in property that is normally tax-exempt, fails to pay taxes, either directly or indirectly, to the same extent that Appellant is here called upon to pay them.

C. Non-federal property that is exempt from taxation under Texas law normally loses its exemption from taxation when not-owned and used exclusively for the exempt purpose, so that users and occupiers of such property normally pay taxes on it through a tax-paying landlord, if not directly. Since this is not true of federal property, it

was within the bounds of permissible classification for tax purposes for the legislature to erect a class of users and occupiers of federal property for profit, and to authorize the taxation of members of this class on their property right of use and occupancy of the federal property.

D. Congress has specifically consented to the taxation of the "lessee's interest" in the property here in question, and the enabling act by means of which the State accepts this invitation to tax should not be deemed discriminatory legislation. Congressional consent has removed from this case any question of "federal immunity" from taxation, leaving only the question of whether or not Appellant should be made to bear the same tax burdens borne by its competitors in the business community.

## II.

A. Although the tax here in question may be an ad valorem tax, rather than a privilege or use tax, it does not follow that it is, *a fortiori*, an *invalid* ad valorem tax under the authority of *United States v. Allegheny County*, 322 U. S. 174 (1944). The tax is laid, not upon the federal property itself, but upon a private property right, the right of use and occupancy for profit. This right of use and occupancy, under Texas law, is a valuable property right, and is taxable as any other property. There is no logical distinction between a *privilege* of use and possession and a *property right* of use and possession, and both are equally subject to taxation.



B. The property right of use and occupancy is taxable under Texas law. A group of Texas cases, decided some seventy years ago and here relied upon by Appellant, do not hold to the contrary. To the limited extent of any remaining validity of these cases, as analyzed and construed by the Supreme Court of Texas in this case, they are not in point here. The controlling feature of this case is the 1950 statute, not the 1888 decisions.

C. The tax here in question is not discriminatory when viewed as a tax upon the private property right of use and occupancy of exempt property. The "privilege taxes" approved by this Court in the "Michigan cases," *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958), and *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958), are no more universal in application within the bounds of permitted classification, nor more even-handed or non-discriminatory, than the taxes in issue in this case.

D. The "Immunity Doctrine" is not applicable in this case, because the tax is not laid on a property interest of the United States. Regardless of the deviations that have occurred through the years, the doctrine of *McCulloch v. Maryland*, 4 Wheat. 316 (1819), as now and in more recent years applied by this Court, will not be extended to exempt from taxation by the States the private interests of those who deal with the United States, or obtain their rights, privileges, or property interests by contract with the United States.

## ARGUMENT

### I.

## THE TAX DOES NOT DISCRIMINATE UNCONSTITUTIONALLY AGAINST THE UNITED STATES AND ITS LESSEES

### A. Chapter 37 Is Not Invalid as Special Legislation Directed Solely Against Federal Lessees

It is not denied by Appellee that *Section 1, Chapter 37, 1950 Texas Session Laws* (amending *Article 5248, Revised Civil Statutes of Texas*, and hereinafter referred to as *Article 5248*) is a statute directed at users and occupiers of federally-owned, tax-exempt property. It is admitted that the purpose of this legislation was to provide a method whereby taxes could be assessed against persons and entities using and occupying property that is exempt from taxation in and of itself, in the hands of the federal government as owner. It is true that the statute does not apply to the users and occupiers of any other type of tax-exempt property. All of these matters are self-evident from the terms of the statute itself.

However, it does not necessarily follow that, for these reasons, the statute is invalid and unconstitutional. No state statute stands by itself. Most statutes have a limited application to some specific object. In determining the validity of a statute, it must be viewed in the light of the over-all statutory scheme of which it is a part. *Atlantic Coast Line Railroad Co. v. Phillips*, 332 U. S. 168, 179 (1947).

This is particularly true of taxing statutes. Almost any such statute would appear to be discriminatory if viewed alone, because by placing a tax upon one object only, and failing to levy a tax upon anything else, it would appear to be placing the entire burden of taxation upon such object. It is only where a taxation statute, viewed with relationship to other parts of the scheme of taxation, is then shown to be discriminatory, beyond the permissible bounds of classification, that a taxing statute should be declared invalid. *Tradesmens National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560, 568 (1940). Such a test of validity must be considered implicit in all decisions of this or any other court where the validity of a tax statute was called into question.

Appellee believes that *Article 5248*, when viewed in its proper place in the Texas taxing system, is not unconstitutionally discriminatory, even though it applies, by its terms, only to users and occupiers of federal property for profit. Appellant cites *Miller v. Milwaukee*, 272 U. S. 713 (1927), for the proposition that a state taxing statute that is directed specifically at the federal government is, *a fortiori*, unconstitutional and void. Appellant obviously misconstrues the holding of *Miller v. Milwaukee*, which case would be in point here only if no other exempt property used and occupied in a private capacity for profit were taxable under the Texas taxing system. See *Pacific Computing v. Johnson*, 285 U. S. 480 (1932).

Again and again, throughout its Brief, Appellant poses the question before this court in such a way as to attempt

to avoid the genuine issues in question. For example, near the bottom of page 13 of its brief, Appellant states that the "Texas taxing system leaves no room for the argument that the purpose of Chapter 37 was solely to place federal lessees on a parity, tax-wise, with lessees of other exempt property." Appellant thus attempts to restrict the consideration of the classification erected by the Texas legislature in this area of taxation by considering one class to be composed of potential tax payers who are lessees of federal property, and another class of potential tax payers who are lessees of other exempt property. Appellant hammers away at this throughout the brief: over here are the lessees of federal property, and over there are the lessees of other exempt property. Never does Appellant concede that this matter may be thought of in the light of two classes, one composed of business enterprises, with a profit motive, using, occupying, and operating their businesses in properties that are owned by the federal government, and upon which no taxes are paid, either directly or indirectly, nor by way of increased rent to a tax-paying landlord, and the other group composed of similar business enterprises who either own their own properties, and pay taxes thereon, or who rent from landlords who must pay taxes on the property, and pass along the cost thereof in the way of increased rent.

In the various parts of its argument, Appellant seems to go so far as to indicate that if any tax-exempt property other than federal is leased, and the lessee is not taxed in the same way and to the same extent that Appellee is

attempting to tax Appellant here, then that it necessarily follows that this tax is invalid.

This argument is not sound because it must be recognized that there is a practical problem that faces a legislature in attempting to find a means to impose permissible taxes upon those who deal with the federal government. It is a simple matter for the legislature to provide, for example, that the property of the Boy Scouts of America is exempt from taxation, unless it is leased or used for profit, in which event it becomes fully taxable. This same direct approach cannot be used with respect to federal property, because the exemption from taxation of such property is not granted by the state legislature, and the state legislature cannot take it away. Yet, if the property of the Boy Scouts is leased, used, or occupied with a view to profit, the property should be subject to taxation, and of course the tax will eventually, if not directly, be paid by the person who so uses it for profit. The exemption is taken away, and the legislature can impose the tax upon either the owner or the user of the property, knowing that the user will eventually bear the economic burden of the tax. In the case of federal property, however, even though the legislature may feel that the user should pay taxes to the same extent as the user of the Boy Scout property, a different method of imposing the tax upon him must be found. The State legislature has no right or power to impose a tax directly upon the federal government, expecting the government to pass the economic burden along to the user for profit. Yet, if the user and occupier of one

property should be subject to taxation, why should not the user and occupier of the other property pay a similar tax?

Thus, the entire problem may be viewed in this light. If the tax is one which could be imposed, and which probably would be imposed, if the taxpayer were dealing with someone other than the federal government, then the tax should not be deemed invalid merely by virtue of the fact that it is imposed when such taxpayer is in fact dealing with the government. The immunity of the federal government should not be used to defeat the right of a State to impose taxes on a private business, commensurate with taxes being imposed upon competitors of such private business, merely because the business in question is a lessee of the federal government. A State should not be deprived, under the guise of federal immunity, from levying every tax upon a business that would be levied upon other comparable businesses, merely because one conducts its business in a property that is owned by the federal government, and the others conduct their businesses in properties otherwise owned.

Again, it should be kept in mind that not even the incidence of the tax is the controlling factor in determining the question of the validity of the statute here. Appellant attempts, in stating its case, to restrict the question to a comparison of the tax placed upon a lessee of federal property with that placed upon a lessee of other exempt properties. Such a narrow posing of the problem is not realistic. In one case there may be a tax upon a lessee, or a user or occupier, of exempt property, whereas in another case the



property itself may lose its exemption, but the real result is the same in either case, if in fact the exemption is taken away when property otherwise exempt from taxation is used with a view to profit.

### **B. Chapter 37 Does Not Illegally Discriminate Against Users and Occupiers of Federal Property**

It is apparent, of course, that Appellee believes that the Michigan cases decided by this Court in the 1957 term support the validity of the Texas tax at issue in this case. *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958; and *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958). Appellant argues, on the other hand, that the taxing system of Michigan is so different from that of Texas that these cases actually require a holding in this case that the Texas tax is unconstitutionally discriminatory (Brief 15). This argument is based upon the proposition that the Texas statute, *Article 5248, Revised Civil Statutes of Texas*, purports to lay a tax upon lessees of federal property which is different from and less burdensome than the tax laid upon lessees of other tax-exempt property. Thus, again is seen Appellant's insistence that the classification involved is of the two types of lessees, and its refusal to face the fact that Appellant is classified here for tax purposes as a user and occupier of property for profit of a valuable commercial property, whose business competitors that own their own property or rent from private landlords pay taxes,

either directly or indirectly, on the property that they use and occupy. Neither the legislature nor the Courts of Texas have attempted to equate the tax provided in *Article 5248* with the tax on certain lessees of exempt property provided for in *Article 7174, Revised Civil Statutes of Texas*, but Appellant persists in attempting to show that such an equality would be the only validly applicable purpose of the statute.

*Article 5248* recognizes, for tax purposes, the valuable property right that a private entity has when it has the right of use and occupancy of a property for profit. As is shown in the Appendix to this Brief, in almost every circumstance where tax-exempt property, other than federal, is used in Texas with a view to profit, the tax exemption is lost. Further in those cases where federal property is not involved, it is a simple matter for the State to enforce this deprivation of exempt status; it can be done by direct legislative action, or it may result simply from the judicial enforcement of constitutional or statutory provisions. Such simple and direct method is not available, however, in the case of federal property that is being used and occupied for profit. In the absence of congressional consent, the State may not impose a direct tax upon federal property, even though such property is being used and occupied for private purposes. Since the economic incidence of a property tax is almost always on the user or occupier of the property, either in the form of direct payment or in the form of increased rent, and since the user or occupier will thus pay the tax whether it does so directly, as under the

present statute, or indirectly in the event the tax is levied directly against the property, it seems not unreasonable to argue that a tax should not be deemed invalid merely because it is levied directly against the user and occupier, and levied directly on his right to use and occupancy as a valuable property right. If the tax thus levied upon him serves to place him in a more equable position with others of the community using property for their own private use and benefit, no invalidity should be read into the taxing statute merely because, procedurally and technically, the tax payer is in a different position from that of other users or occupiers of property for profit.

When viewed in the light of actual results accomplished by the statute now under attack by the Appellant, it is seen that the Appellant actually is complaining because the State has chosen not to allow Appellant to remain in the most favored group of potential tax payers but has chosen to place it in the same position, tax-wise, as the vast majority of its competitors. It might be said that the crux of Appellant's argument is that if a single example can be found of a lessee, or user and occupier, of property otherwise exempt from taxation, who does not pay the same tax that Appellant is required to pay under the present statute, then such statute is invalid, regardless of the fact that on the other side, many tax payers can be pointed out who do pay the same tax that Appellant will be required to pay if this statute is upheld. This argument has been rejected by this Court, *Tradesmen's National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560, 568 (1940).

As is clearly shown by the examples and authorities set forth in the Appendix to this Brief, the exemption from taxation in Texas is closely restricted and strictly construed. Except for the exemption for government property, national, state, and local, property is not exempt from taxation unless it is held and used either for public purposes, educational purposes, religious purposes, or for purposes for purely public charity, *Section 2, Article VIII, Constitution of Texas*. When property is not held and used for such exempt purposes, then within the limits of the State's power to do so, the exemption is taken away. Even the property of State and local governments loses its exemption when it is not owned and held for public purposes, *City of Abilene v. State*, 174 S. W. 2d 621 (Tex. Civ. App. 1947), error dismissed.

Since the law as it was in Texas before the amendment to *Article 52* already provided for the loss of the exemption in the case of private use of all property except federal property, it was not arbitrarily discriminatory for *Article 52* to apply only to federal property. The enactment of this statute was plainly an attempt, within the scope of the permission granted by Congress, *Act of August 5, 1947, ch. 494, 61 Stat. 721*, to bring the tax position of users and occupiers of federal property into a position of equality with the users and occupiers of other property generally exempt from taxation when held, owned and used by its owners, *Pacific Company v. Johnson*, 285 U. S. 480 (1932); *Tradesmen's National Bank of Oklahoma City v. Oklahoma Tax Commission*, 309 U. S. 560 (1940).

Appellant makes a point of the fact that Appellee can cite no cases where a temporary use and occupancy for profit of State or local property resulted in the loss of the tax exemption. Appellant apparently believes that this indicates that the State has one rule for federal property and another and different rule for its own property, and the property of its political subdivisions. Actually, this does not necessarily follow, because Appellant cannot cite any situation where State or local government property in the State of Texas creates a condition like that presented in this case. If the State of Texas, or any of its political subdivisions, own or hold any property designed and built for commercial purposes, and now used or occupied by any private person or entity for profit, then the Appellant has wholly failed to show what it is. The most that Appellant can show, from any decided case in this jurisdiction, is that from time to time, a governmental subdivision may hold some property for public purposes, and pending the actual development of the property for the intended use, there may be a temporary leasing of the same. For example, see *City of Abilene v. State*, 113 S. W. 2d 331 (Tex. Civ. App. 1937), *error dismissed*. Such interim leasing is a far cry, however, from the situation that is presented by the billions of dollars' worth of prime industrial property,

*The State Board of the Natural Resources of Texas*, *State of Texas v. State Board of the Natural Resources of Texas*, 141 S. W. 2d 331 (Tex. Civ. App. 1940), *error dismissed*. This case involved a lease of land for the purpose of oil and gas exploration, and the court held that the lease was valid.

The Government has estimated that the Department of Defense alone controls more than \$100,000,000 worth of industrial plants, in the hands of private contractors. *Department of Defense v. United States*, 141 S. W. 2d 331 (Tex. Civ. App. 1940), *error dismissed*. This case involved a lease of land for the purpose of oil and gas exploration, and the court held that the lease was valid.

owned by the United States government, and dedicated to private commercial use through leases such as that involved in this case. Property of this kind was originally acquired or constructed, in most cases, for a purpose usually deemed commercial rather than governmental in our American politico-economic system, the manufacture of the implements of war. Because private industry could not meet the emergency demands of war, the government found itself a landlord of commercial property on a large scale. There is no showing in this case that the Texas statute would apply to any other type of leased federal property than these commercial manufactories, or that the government has any other type of property available for use or occupancy by a private person or in the conduct of a private business.

At every stage of the proceedings in this case, Appellant has had ample opportunity to show where any comparable situation exists, with regard to any exempt property other than federal, but it has not done so and can not do so. At page 29 of its Brief, Appellant states that "although Texas and its political subdivisions may not own industrial plants reserved for national defense, the State and its agencies do own and lease properties of even greater value." Then, presumably because it is the only example, Appellant cites as "the most outstanding example of such properties," the "extremely rich and prolific oil and gas lands of Texas and its subdivisions" which, it is stated, are periodically "leased" for millions of dollars to private corporations. It is surprising that such a statement should be found in a



brief filed by oil company lawyers. It is well-known that the Texas oil and gas "lease" is not a lease at all, but is a conveyance of oil and gas in place as an interest in real property. *Texas Company v. Daugherty*, 107 Tex. 234, 176 S. W. 717 (1915); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290 (1923). These same cases hold that the real property interests of the lessees under oil and gas "leases" are taxable to the lessees just as any other real property is taxed. Naturally, if leases from the State or its political subdivisions carried with them an exemption from taxation on the lessee's interest, such leases would be much more valuable, and would bring a higher price in the market than leases from private individuals, but the State of Texas has never contended that the interests of the lessees are not subject to taxation. *Greene v. Robison*, 117 Tex. 516, 8 S. W. 2d 655 (1928).

This position, which was adopted from the beginning in Texas, contrasts sharply with the earlier position of this Court on the state taxation of the interests of a lessee in federal land. *Indian Territory Illuminating Oil Company v. State of Oklahoma*, 240 U. S. 522 (1916); *Gillespie v. State of Oklahoma*, 257 U. S. 501 (1922). These cases held that a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them. In other words, the government might be able to bargain for higher royalties if its lessee were free from a net income tax which lessees of private land must pay, or if such lessees were free from property taxes which the lessees of private lands must pay. These earlier cases have, of

course, now been overruled by this Court, and the immunity of a lessor is not now held to extend to his lessee, in the case of oil and gas leases, *Hedberg v. Mountain Producers Corporation*, 303 U. S. 376 (1938); *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 342 (1949).

The Appellant points out that the Michigan statute validated by this Court in 1958, by its terms applied to lessees of federal property and also to lessees of all other tax-exempt property, and that this point was relied upon by this Court in approving the statute. Appellant then reasons that because the Texas statute does not, by its terms, apply to lessees of all tax-exempt property, that the Texas statute is necessarily discriminatory. Viewed simply within the framework of the rules of syllogistic reasoning, the conclusion is fallacious. The major premise stated is not a *sine qua non* of equitable taxation, because the essential equality of taxation need not be determined alone from the terms of any one statute, but is to be determined from the taxing viewed as an integrated whole.

Property that is exempt from taxation in the State of Texas may be divided into three general classes. The first, of course, is property of the United States, and perhaps it would be more proper to use the term "immune" than the term "exempt" with reference to such property. The second class would be property of the State and its political subdivisions. In the third class may be placed all property that is privately owned, but which is made exempt as a matter of legislative grace, either because the property has attained a quasi-public status because of its dedication to

a public use, or because the property is dedicated to a use worthy of encouragement and favor as a matter of public policy, such as an educational, religious, or charitable use. The right to the exemption accorded to any of the three classes of property above listed is strictly restricted and construed in Texas, within the permissible limits of State power. With reference to property of the United States, of course, the question of state power is governed by the federal law, and in general it may be said that the immunity of the United States can not be lost, it can only be waived, by the action of the federal government itself. With reference to the private property that is exempted from taxation by legislative grace, by reason of its manner of use, it is clear that the exemptions are at all times strictly construed, as is shown in the various cases and statutes cited and discussed in the Appendix to this Brief. If only these two classes of exempt property were under consideration here, there would be no question but that *Article 5248* simply effects an equalization of tax burdens between those who use federal property for private purposes, and those who use other property, exempt from taxation when held and used by its owner for public purposes, for the private purposes of the lessees and users. In the case of private property exempt from taxation, the exemption may simply be taken away, as it was given, by the legislature, when the property is put to private use for a profit. In the case of federal property, however, since the exemption is really an immunity not within the power of the state to give or take away, the desired equality must be attained, if at all.

by imposing a tax upon the private lessee, user or occupier of the property. This much is clear.

The only real question in the case, then, arises when the tax treatment of users and occupiers of federal property is compared with that of users and occupiers of State and local government property, and might be posed as follows: In the light of the facts in this case, is there any showing of a real and genuine discrimination against users and occupiers of federal property?

Under the Constitution of Texas, the property of State and local governments is exempt from taxation only when it is used for public purposes, *Section 2, Article VIII and Section 9, Article XI, Constitution of Texas; City of Abilene v. State*, 113 S. W. 2d 631 (Tex. Civ. App. 1937, error dismissed), and no authority exists for the proposition that such property is exempt when not so held and used. The most that can be said about the few decisions of the Texas Courts in this area, in favor of Appellant's position, is that perhaps some decisions may show a fairly liberal construction of the phrase "public use." No case holds, however, that the exemption from taxation will survive a dedication to non-public use of State or local government property. Further, if the exemption should be lost, under the Constitution and statutes, it would presumably be wholly lost: there would be no partial exemption. Again, the legislature gives, and the legislature can take away, and the right to exemption is either present or it is not present.

An important factor in the consideration of this problem consists in this fact: There is no showing in this case, any-

where in the record, that a single example exists in the State of Texas of any State or local government property that is designed for commercial purposes, or that is subject to such private commercial use, and that is leased to private entities for profit, in the same way that the ordinance works in this case, and the many other similar federal properties, are leased to private businesses. The most nearly comparable State or local property would have to be considered the public lands owned by the State and its subdivisions, some of which may be leased to private entities, although there is no showing in this case to that effect, and there is no showing that any use being made of any such State-owned property is comparable to the use that is being made of the federal property in question, or any other federal property being used for a profit by a private person. Further, as is shown by the examples set forth in the Appendix to this Brief, a considerable part of the public property of this State and its subdivisions is expressly made taxable, either in whole or in part; and when in part only, there is a reasonable basis for withholding full taxability.

Appellant attempts to argue in its brief that the fact that the property in question here is held by the government in continued ownership because of its potential value to the national defense, constitutes an additional reason why the use and occupancy of the property should not be subject to taxation. The implication is that this attempt to tax is nothing more than a form of sabotage of the national defense. Where, however, as here, the tax is levied against the

property interest of the user and occupier rather than that of the government itself, the Appellant's argument is not sound, because the only effect that such taxation could have on the federal government, or its defense efforts, would be the indirect economic effect that taxability of the right of use and occupancy would have upon the rent that might be bargained for by the government, and such economic effect is not supposed to have any bearing on the question. *James v. Dravo Contracting Company*, 302 U. S. 134 (1937); *Alabama v. King and Boozer*, 314 U. S. 1 (1941). The only real effect that this extensive ownership of industrial and commercial properties by the United States, and its leasing of these properties to private persons, has upon the question presented here, is that such ownership has the effect of creating a class of persons who use and occupy federal industrial and commercial properties for their own private gain, which class has no counterpart with reference to State property. If the reasoning of Appellant is followed, then this class of persons, who own valuable rights of use and occupancy in such federal properties, would escape the ad valorem State taxation of such property, merely because there is no corresponding class of owners of similar interests in State and local property.

In considering the foregoing, it must always be kept in mind, of course, that the lessee of any property not exempt from taxation, or any other user or occupier of such property, will be presumed to be the person who actually pays, from an economic standpoint, the taxes on the property, either directly, as the owner of the property, or indirectly



in the way of increased rent or other compensation paid for the use of the property. Therefore, the question of whether the lessee, user, or occupier of the property pays the property taxes directly or not, is an immaterial question. Requiring the user or occupier of property upon which the owner pays no taxes, to pay taxes on such property does not discriminate against such user or occupier, but merely puts him on a more equable basis with other persons who are in a similar position to his except that they use and occupy property on which the owner pays the taxes.

Appellant attempts to minimize the extent to which the State of Texas has gone in subjecting its own property, and the property of its political subdivisions, to at least partial taxation. (*See Appellant's Brief, Appendix B.*) When this matter is carefully examined, however, it is seen that actually the extent of such permissible taxation is fairly broad, and that most of it is based upon general considerations very similar to that which makes taxation of Appellant in this case equitable. Appellant is a private corporation, conducting a business for profit. It has employees who have children attending local schools, and Appellant and its employees require all of the local governmental services that are required by any other citizens of the State and local political subdivisions. All questions of immunity and tax exemption of various kinds aside, it just does not shock the conscience to contemplate the imposition of taxes upon Appellant on its interest in the property to the same extent that such taxes would be imposed if Appellant owned the underlying property in fee. "Other things being the same, it

seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval." *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466, 470 (1958). Similarly, there are many circumstances in which it seems equitable and proper to remove, at least in part, the tax exemption of certain public properties owned by the State and its political subdivisions, and there are many equally valid reasons for not removing such exemptions entirely and in all cases.

Consider, for example, the lands of the University of Texas. These lands were set apart to the University by the legislature many years ago, *Act of February 11, 1858, General Laws of the State of Texas 1020*, for the purpose of providing a source of income to the University in order that it might fulfill its function, as an agency of the State. To the extent that the income from these lands fails to provide adequate funds for the full program of the University, other funds must be provided by the State to meet these needs. Obviously, therefore, the taxation of property of the University of Texas for state purposes would result in nothing more than taking money from one State fund and transferring it to another, only to have to transfer it back again. Nothing could possibly be gained by such a procedure. Further, the University of Texas is but a part of the entire educational system of the State, the elementary and secondary phases of which are administered by local school districts. Since the State, by special and general appropriations, pays a large part of the cost of all parts of

the whole educational system, again nothing would be gained by transferring funds from the University to the local school systems, and it is therefore quite realistic to exempt the properties owned by one part of this educational system from taxation by the other part. Thus, since it would be a useless thing to require the payment of state or school taxes on the University lands, and since such lands are subject to county taxes, *Article 215th, Revised Civil Statutes of Texas*, it follows that the only real exemption of such University lands from taxation is that from taxation by such local bodies as irrigation districts, water districts, etc., which make up only a very small part of the State and local tax picture in Texas.

Likewise, there is a logical reason for the fact that county school lands remain exempt from taxation for State purposes. *Section 6a, Article VII, Constitution of Texas*. Such county school lands are subject to taxation to the same extent as lands privately owned, except for State purposes. Since the State pays out of its general revenues a large part of the cost of supporting the county school systems of the State, to require counties to pay State taxes on their school lands would result merely in having the money paid in to the State and repaid to the counties, a patently useless procedure.

The same reasoning set forth above with reference to the county and university school lands likewise now, and for a period of more than 60 years past, has applied to all other parts of the public domain in Texas, all of which is now owned by the permanent school fund of the State. In

the Constitution of 1876, one-half of the public domain was set apart and dedicated to the public school fund. *Section 2, Article VII, Constitution of Texas*. By the year 1898, homestead grants, railroad grants, and other dedications of the public domain had more than exhausted all of the public lands of the state not so dedicated to the permanent school fund. *Hogan v. Baker, 92 Tex. 58, 15 S. W. 1004 (1898)*. Thus, today, except for such lands as may be publicly owned for city hall, court houses, parks, schools, and other such specific purposes, all of the public land of this state belongs either to the public school fund, the University of Texas permanent fund, or local county school funds, and any taxation of the same by the State or its local political subdivisions would merely result in the necessity for additional general State appropriations for educational purposes.

### **C. The "Classification" Problem and the Texas Statute**

In its brief, Appellant attempts to contrast the question presented in this case with that presented in the Michigan cases, by attempting to show that, under the Michigan statute, there was an "even-handed and non-discriminatory" tax, which is not found in the Texas statute. Appellant specifically refers to at least three statements found in *United States and Borg-Warner Corporation v. City of Detroit, 355 U. S. 366 (1958)*, showing that under the Michigan statute there was no distinction made between users of exempt property in Michigan, depending upon the ownership of the underlying property.

However, an examination of the Michigan statute reflects that the tax is not as universal in its application as Appellant argues here that it is. The statute itself specifically excludes from its operation and effect several classes of exempt property. The first exclusion is that of a private use of exempt property "by way of a concession in or relative to the use of a public airport, park, market, fair ground or similar property which is available to the use of the general public." The next exclusion is federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed. The third exception is property of any State-supported educational institution. *Public Act 189, 1953, 6 Mich. Stat. Ann. 1950 (1957 Com. Sapp., Sections 7, 745) and (6).*

Appellee here does not argue that the Michigan statute would be ineffective or invalid by reason of these exceptions. Rather, Appellee contends here, as it has consistently argued heretofore, that the provision for exceptions to a taxing statute does not invalidate the statute. *Carmichael v. Southern Coal & Coke Company, 301 U. S. 495, 509-510 (1937)*. The State has a wide discretion in granting exceptions to its taxing laws, and has a wide discretion in creating and enumerating the permissible classes of property for purposes of taxation. *Watson v. State Comptroller of the State of New York, 257 U. S. 132 (1921)*; *Southeastern Oil Co. v. Texas, 217 U. S. 111 (1910)*.

At page 31 of its Brief, Appellant attempts to belittle a contention previously made by Appellee that the fostering

of local interest, within reasonable bounds, may provide sufficient grounds for distinction in tax treatment. Regardless of Appellant's views on this matter, it is nevertheless true that this Court has, in the past, sanctioned such distinctions. *Watson v. State Comptroller of the State of New York*, *supra*; *Welch v. Henry*, 305 U. S. 134 (1938). Certainly, in the case of the Michigan statute, the exception applicable to property of State-supported educational institutions must necessarily have been placed in the statute to foster the local interests of the State, and yet this exception was not deemed by this Court to have any substantial bearing on the validity of the statute. Likewise, in the present case, although the taxation of private interests in property otherwise exempt, when used for private purposes, is restricted to federal property when *Article 5218* is considered alone, and without regard to other taxing statutes of the state, it is nevertheless shown in this brief (*Appendix*) that almost all property normally exempt from taxation under the general taxing system of Texas loses its exemption when it is used for private purposes, and indeed much of such property otherwise exempt has been subjected to taxation by the legislature, even when not used for private purposes. The State has a wide discretion in determining the classes of exemption from taxation. *Hopwood v. Silas Mason Company, Inc.*, 300 U. S. 577 (1937); *Reister Gaudio Co. v. Virginia*, 253 U. S. 122 (1920). Except for a few possible instances of property devoted to the support of public education in Texas, there has been and can be no showing that exempt property remains exempt when devoted to private use. Thus, while the Michigan



statute reaches this result within itself, the Texas statute in question reaches the same result, when considering *in pari materia* with other relevant State statutes. While there may be some distinction made between the tax status of federal property used for private purposes and other exempt property used for private purposes, these distinctions are minor, and they bear some relationship to a permitted end of government action. *Watson v. State Comptroller of the State of New York, supra.*

#### **D. Congress Has Consented to the Taxation of the Lessee's Interest in the Property**

The importance to this case of the *Military Lessee Act of 1917*, Act of August 5, 1917, ch. 193, 61 Stat. 774, should not be minimized. Section 6 of this Act specifically provides that "the lessee's interest, made or created pursuant to the provisions of [this act], shall be made subject to State or local taxation." The Act does not say that the privilege of use shall be made subject to a State privilege tax or use tax. The "lessee's interest" is expressly made taxable. The logical meaning of this provision is that Congress contemplated that the leasehold, or the right of use and possession, or whatever it might be called, would be taxable as a property interest. Further, even if this construction of the Act is not required by the quoted provision, at least no other contrary construction is required thereby. That a property interest was intended to be made subject to taxation is also recognized in *Giffatt Housing Company v. County of Surry*, 351 U. S. 253 (1956). When such consent to taxation has been granted by Congress, the usual

rules with reference to immunity may be ignored, and the statute will be deemed controlling, *Baltimore National Bank v. State Tax Commission of Maryland*, 297 U. S. 209, 211 (1936).

The existence of this consent to taxation even tends to destroy one of the arguments of Appellant that the Texas statute is discriminatory. Appellant, citing *Miller v. Milwaukee*, 272 U. S. 713 (1927) argues that a tax directed against the United States is invalid for no other reason than that it is so directed. Even assuming this construction of *Miller v. Milwaukee* to be correct, a later case modifies the holding in a way that is very pertinent to the present case. *Pacific Computing v. Johnson*, 285 U. S. 480 (1932), considered a California corporate franchise tax which, for the first time, added income from United States bonds to the tax base. It was shown that, after this Court has held such practice permissible, California had amended its constitution and statutes to take advantage of the additional tax permitted. This Court held the tax valid, even though it was obviously designed to levy a tax upon the federal bonds; since it was permitted, the tax would not be held invalid. Thus, in the present case, where Congress has specifically authorized the State tax, this Court should not invalidate the State acceptance of the "invitation to tax" on the ground that accepting the invitation is evidence of discrimination.

Appellee does not contend, of course, that the consent of Congress to tax the lessee's interest constitutes a license to discriminate against such lessees. On the other hand, since

the statute does not specify taxation of the "leasehold," in a technical sense, but uses the words "lessee's interest," the States should be allowed to determine the nature of the lessee's interest in accordance with applicable State law, in such a way as to attempt to equate the tax burdens of private persons using federal property for commercial purposes with those of their business competitors using other types of property.

Uniformity in the field is not required, *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204 (1946), or obtained, *Missouri v. Personnel Housing, Inc.*, 300 S. W. 2d 506 (Missouri, 1957), (lessee's interest taxed as an interest in realty); *Offutt Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N. W. 2d 382 (1955) (lessee's interest taxed as an interest in improvements on leased public lands); *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Riverhead*, 2 N. Y. 2d 500, 141 N. E. 2d 794 (1957) (lessee's interest is personalty, not subject to local taxation under State law).

It is only when the classification of taxpayers that Appellant erects, consisting of "federal lessees" on the one hand and "other lessees" on the other, is used that any discrimination argument may be advanced. It is not discriminatory "to promote fair competitive conditions and to equalize economic advantages," and to equate the tax burdens of persons using federal property for commercial purposes with their business competitors using non-exempt property, *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1947).

At page 36 of its Brief, Appellant states that it is not claiming a complete exemption from State taxation. This is a reversal of the position that Appellant has maintained throughout these proceedings to this time. Heretofore, it has asserted that no taxes of any kind could be assessed against it on any interest in the property. (R: 4, 5, 6.) Apparently it is now conceding that the State (and therefore Appellee as well) is authorized to assess taxes against the "lessee's interest," if such taxes are nondiscriminatory. Since this was all that Appellee ever attempted to do (R. 22), and since this is what the Texas Court held was done (R. 188-189), then it appears that the only remaining question in the case should be whether or not the taxes so assessed are discriminatory.

## II.

### THE TAX IMPOSED IS NOT A TAX UPON FEDERAL PROPERTY

The substance of Appellant's argument in the second major subdivision of its Brief seems to be based upon a contention that the holding of this Court in the 1958 Michigan cases must be limited to those cases where the questioned tax is a use or privilege tax, and that if the tax is labeled ad valorem, a case involving such tax must automatically be deemed analogous to *United States v. Allegheny County*, 322 U. S. 174 (1944). At page 37 of its Brief, Appellant attempts to distinguish the Michigan cases from *Allegheny County* by explaining that "the event giv-

ing rise to taxability (in the Michigan cases) was the use and enjoyment of the property," so that the taxes were held valid as use taxes, while in *Allegheny County* the tax was "accordingly held by this Court to be unconstitutional as an ad valorem tax."

This Court has never been misled by an attempt to substitute semantics for substance. The Court is not concerned with the definition or the precise form of descriptive words applied to a tax, but is concerned only with its practical operation, and the Court will look through form and behind labels to substance. *Lawrence v. State Tax Commission*, 286 U. S. 276, 289 (1932); *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 492 (1958). Appellant has apparently arrived at its conclusion that this tax must necessarily be invalid as an ad valorem tax on some kind of property interest. Appellant's reasoning is incorrect throughout because it begins with such an incorrect assumption and basic premise. The problem of labels and substance here is discussed by Mr. Justice Harlan, in his separate opinion in the Michigan cases. (355 U. S. 505.) In his opinion, the dissenting Justices were said to have equated "the measure of the tax with the subject of the tax," and that the dissenting opinion "concludes that the tax imposed upon those using tax-exempt property for private profit should be regarded in substance as a tax on the property itself because the privilege tax is measured by the full value of the leased or used property, rather than merely by the value of the lessee's or user's interest." He

also recognized, however, that the effect of the majority opinions in these three cases was virtually to eliminate the distinction, from the standpoint of constitutional validity, between property taxes and privilege taxes, when a tax labeled a property tax is attempted to be applied to a property interest that amounts to a privilege of use and possession. Appellee would agree that if, under the prior decisions, there was any basic distinction, from a constitutional standpoint, between a property tax and a privilege tax, that the distinction was erased by the Michigan cases.

This is not to say, however, that under the prior decisions, there was any real difference between a privilege tax and a property tax, or that a property tax was necessarily invalid. Certainly a property tax upon a property interest less than fee simple ownership is not new. Many years ago, the State of Washington considered the nature of the property interest created by a lease of tax-exempt property. In *Moullier v. Gormley*, 14 Wash. 465, 87 Pac. 506 (1906), the Court said:

"When a lease is given by the State to an individual or private corporation, the lessee thereby obtains for his or its private use, certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, it should not be subject to the general rules of taxation we conceive of no reason."

Several years later, the same question that was before the Washington Court, involving the same type of lease and the same taxing statute, was brought to this Court, in *Trimble*



*v. City of Seattle*, 231 U. S. 683 (1914). The property tax on the interest of the lessee was upheld by this Court, and the Court stated:

"When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed."

Congress itself has recognized, in such a lease as is involved in this case, that the interest of a lessee is an interest in property which is subject to taxation. The statute authorizing the lease specifically provides that "the lessee's interest, made or created pursuant to the provisions of [this act] shall be made subject to state or local taxation." *Act of August 5, 1947, ch. 493; 61 Stat. 774*. Therefore, even if the tax here is an ad valorem tax, and could not be considered any other type of tax, it does not necessarily follow that the ad valorem tax is on a property interest of the United States, or that it is on the federal property.

#### **A. The Incidence of the Tax is Upon a Private Property Interest of Appellant**

Appellant argues (Brief 39-45) that the tax imposed by the Texas statute was necessarily an ad valorem tax on the government property itself, because of certain features of the Texas taxing system which would necessarily require such conclusion.

First, the proviso authorizing the taxation here in question is quoted, at page 39, and Appellant urges that the only operative language in the statute is "any portion of

said lands \* \* \* shall be subject to taxation by this state and its political subdivisions." It is argued that this language could mean only one thing, and that was that the Texas legislature was attempting to legislate away the immunity of the United States to taxation on its property, and that the statute represents an invalid and unconstitutional attempt to tax the property itself. Appellant then accuses the Supreme Court of Texas of "speculating" that the legislature meant to tax "only a lessee of the United States" by this language. "By failing to designate the taxpayer," the Appellant argues, "the Texas legislature clearly manifested its primary concern to tax the property." (Brief 40.)

This argument is not sound. In the first place, the Texas legislature should not be deemed to have attempted to do a vain thing, by attempting to take away an immunity which it did not grant, and which it had no power to take away. Secondly, the Supreme Court of Texas, whose opinion on this matter is due careful consideration, if indeed it is not the final word on the matter, concluded that "it was the intention of the legislature, in amending Article 5248 to make the *value* of the entire property belonging to the United States government, if *used and occupied by private business and operated for profit*, taxable to such user and operator." (R. 181.) Further, "it is a tax levied against the *user and occupier* of such property and is based on the value of the property *used and occupied by it*." (R. 189.) (Italics supplied.)

There should be no difficulty about properly construing this statute, as the Michigan statute contained a similar

lapse in wording, and this Court had no trouble with that statute. The operative words of that statute, in the sense that Appellant has extracted the operative words from the Texas statute, are as follows: "When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, \* \* \* shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property." It is thus seen that some essential word or phrase is omitted from the wording of the Michigan statute; it is not clear from a reading of the statute itself whether it was intended to say that "*the property* shall be subject to taxation" or "*the lessee or user of such property* shall be subject to taxation." This Court did not hesitate to supply the necessary missing words in construing the Michigan statute, so as to make the statute mean that the taxable event was the use, or the privilege of using and occupying, the exempt property; and it should not hesitate to hold, in this case, as the Supreme Court of Texas did, that the intention of the legislature was to levy a tax upon the user and occupier of the property. Only by so holding can the Texas statute have any meaning, because if the statute be held to mean that the legislature intended to impose a direct tax upon the United States on its property, when the property is leased, then the legislature will necessarily have attempted to do a vain and unconstitutional thing, and a legislature will not be presumed to have done so, in the absence of a clear showing of the necessity of such a holding, and unless

there is no other reasonable interpretation that can be placed upon the legislative act. *Porter v. Investors' Syndicate*, 286 U. S. 461, 470 (1932); *Alabama State Federation of Labor v. McAdory*, 325 U. S. 450, 470 (1945).

Appellee has never argued that the tax imposed by the Texas statute is a use or privilege tax. Perhaps it is one; perhaps it is not. Appellant calls it an ad valorem tax, and Appellee has called it an ad valorem tax, but calling it an ad valorem tax does not mean that the tax is levied or assessed on the government property itself. The right and privilege of use and occupancy is a property right, and may be subject to ad valorem taxation. "Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit." *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493 (1958). In the Michigan cases, this Court reaffirmed its position that a State tax law would not be invalidated because of empty formalisms of wording, and certainly this would be the result if a tax should be held valid when levied as a use or privilege tax upon the use or privilege involved in the right of use and possession of exempt property, while another tax would be held invalid because it was levied as a property tax on the property right of use and possession of the same property under the same circumstances. If any one thing in this case is clear and certain it is that, under the facts shown, Appellant's interest in Cactus Ordnance Works is exactly the same as the interest of the Borg-Warner Corporation in the Michigan plant, in *United States of America and Borg-Warner Corporation v. City*

*of Detroit*, 355 U. S. 466 (1958). In each case, an industrial plant owned by the United States was leased to a private corporation for use in the private manufacturing business of the lessee. One other thing is almost that certain, and that is that the Michigan legislature and the Texas legislature were attempting to do the same thing when the two statutes in question were respectively enacted. If this Court should hold, from the standpoint of legislative intent or statutory application, that there is a distinction between the present case and the *Borg-Warner* case, then Appellee believes that "empty formalisms" will have gained a victory.

Appellant urges that the Constitution and laws of the State of Texas would not permit of a holding of this Court that the tax in question is a use or privilege tax. While Appellee has consistently contended, throughout these proceedings and even at the present time in this brief, that there is nothing invalid about a property tax on the property right of use and possession, yet nevertheless Appellee does not concede that the tax could not lawfully be considered a use or privilege tax, under the Constitution and laws of the State of Texas.

It is true that *Section 3, Article VII*, of the *Constitution of Texas* reads in part that "the legislature may authorize an additional ad valorem tax to be levied and collected within all school districts," but it is also true that a previous part of the same section of the Constitution provides that "the legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts."

This general authorization is not necessarily restricted by the provision that "an additional" ad valorem tax may be levied and collected within the districts. Further, *Section 17 of Article VIII of the Constitution of Texas* provides as follows: "The specification of the objects and subjects of taxation shall not deprive the legislature of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

The Texas Supreme Court has held that this provision of the Constitution means that the legislature has plenary power to prescribe the mode of taxation to raise revenue, and that the Constitution does not prevent the legislature from passing laws requiring other subjects or objects not named therein to be taxed, unless expressly prohibited by the Constitution. *State v. Wynne*, 134 Tex. 455, 133 S. W. 2d 951 (1939).<sup>2</sup>

So, in the present case, where the Supreme Court of Texas has held that the statute provides for a tax levied against the user and occupier of such property, based on the value of the property used and occupied by it, such holding of the Texas Court should be considered a matter of local law, and if the Texas Court was not disturbed by the failure to specify distinctly whether it was an ad valorem tax, property tax, privilege tax, use tax, or just

An attempt to appeal *State v. Wynne* to this Court was dismissed, for the want of a substantial federal question. *Citro v. S. & A.* The authority cited in the memorandum order dismissing the appeal was *Hobbs v. Mascoutah County*, 196 U. S. 226 (1905), which had held that the question of whether or not a certain Iowa tax violated the Iowa Constitution because it did not distinctly state the tax and the object to which it is to be applied, was a State question, not subject to consideration by the United States Supreme Court.



that it was, then again, this should not be a matter of federal concern. In other words, if there is a substantial federal question posed in this case, it is not a question of just what kind of tax was imposed against Appellant here, and not a question of whether the tax was an ad valorem tax or a use or privilege tax. The statute authorized the tax, and the Supreme Court of Texas construed the statute as authorizing a tax against the user and occupier of the property, based upon the value of the property used and occupied. Whether this sounds more like a privilege tax, or a use tax, or a property tax, should be of no concern to this Court, since the effect of the tax is identical to that imposed by the Michigan statute as applied in *United States and Borg-Warner Corporation, v. City of Detroit*, 355 U. S. 66 (1958).

To the extent that the decisions in the Michigan cases may depend upon the distinction between a use or privilege tax and a property tax upon the property interest owned by a user or occupier in the property so used and occupied, it is respectfully submitted that such distinction should now be clearly and directly abolished by this court. The separate opinion of Mr. Justice Harlan in the Michigan cases (355 U. S. 505), indicates his belief that the former distinction between property taxes and privilege taxes as a basis for determining the constitutionality of a State tax against a claim of federal immunity has been, by the majority opinions in such cases, blurred if not completely repudiated. Appellee believes that, if the empty formalism of labels is not to be allowed to rear its head again, such

distinction should be here and now repudiated. Certainly it could not be said that this Court stopped very far short of a complete repudiation of such distinction, in using the following language:

"We see no essential difference so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends. Nor have we been pointed to anything else which would bar a state from taxing possession in such circumstances." *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493 (1958).

#### **B. The Texas Taxing System Authorizes the Imposition of This Tax on the User and Occupier of the Property**

As it did in the Supreme Court of Texas, (R. 187) the Appellant relies here upon the old Texas cases of *Daugherty v. Thompson*, 71 Tex. 192, 9 S. W. 99 (1888), *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245 (1888), *State v. Taylor*, 72 Tex. 297, 12 S. W. 176 (1888), *Articles 7173 and 7174, Revised Civil Statutes of Texas*, and one case not discussed by the Texas Supreme Court, *Trammell v. Faught*, 74 Tex. 557, 12 S. W. 317 (1889). In its brief (pp. 16-21), Appellant is apparently attempting to argue that the Texas Supreme Court is either unqualified or unauthorized to discuss, analyze, review and apply the law stated in its own cases, and in the statutes of the State.

As Appellant admits in its brief (p. 20), the holding of the Texas Supreme Court in *Daugherty v. Thompson* was that lands owned by the counties for school purposes were

not subject to taxation, because of the then-existing provision of the State Constitution which prohibited such taxation, even the taxation of a leasehold interest therein. In the present case, the Texas Supreme Court so construed the actual holding of the Court. (R. 187.) Other statements by the Court in *Daugherty v. Thompson*, such as those quoted by Appellant in its Brief (pp. 19-20), are nothing but dictum, and have not been followed by the Texas Courts in any case since the year in which the original opinion was written. See *State v. Taylor*, supra.

Thus, as Appellant urges in its Brief, the opinion in *Daugherty v. Thompson* did state that the wording of the present Article 7173, *Revised Civil Statutes of Texas*, should not be taken to mean what it says in clear and unmistakable terms. This interpretation of the statute has not been applied since 1889, and has not been, as Appellant says it has (Brief P. 20), followed since as settled law in Texas. *Daugherty v. Thompson*, insofar as it holds that a leasehold may not be taxed at the value of the fee, was indeed followed on that point in *State v. Taylor*, 72 Tex. 297, 12 S. W. 176 (1888). (This latter case, however, has not once been cited on any proposition by any Texas Court, from the date that it was decided until the date that its validity was questioned by the Supreme Court of Texas in the present case. See *Shepard's Texas Citations*.) *Daugherty v. Thompson* was also cited, for the same proposition, in *Trimmer v. Faught*, 74 Tex. 557, 12 S. W. 317 (1889). Again, although Appellant calls it "the leading case" (Brief, p. 17), this case has not once been cited by

any Texas Court, except when its validity was questioned by the Supreme Court of Texas in the present case, *Shepard's Texas Citations*. In fact, the only Court that ever cited *Trammell v. Fought* did so only to distinguish it as having been probably overruled by later decisions of the Supreme Court of Texas, *Liberty Central Trust Company of St. Louis v. Gilliland Oil Company*, 297 Fed. 494, 498 (D. Tex. 1924).

Appellant also relies upon *Taylor v. Robinson*, 72 Tex. 364, 10 S. W. 245 (1888). This case concerned the attempted taxation of lands set part to Abner Taylor, the builder of the Texas State Capital. He was in possession of the land under a lease entered into between himself and the State, supplemental to his contract with the State, under the terms of which he was slated to earn the lands through his construction of the building. The tax collector contended that he was in possession of the land, therefore, under a "contract for the purchase thereof." The case merely held that his use and possession of the lands was not under his construction contract, but under the lease, which was for an indefinite term, and that the case did not involve taxation of the leasehold. Thus, this case concerned only the construction of the contract and its supplement, and, with one exception, has been cited by later Texas cases on no other proposition. See *Abney v. State*, 47 S. W. 1043, 1045 (Tex. Civ. App. 1898); *Findlay v. State*, 238 S. W. 956, 961 (Tex. Civ. App. 1921); *Rhoads Drilling Company v. Allred*, 123 Tex. 245, 70 S. W. 2d 584 (1934). The exception was when *Taylor v. Robinson* was

cited for the proposition that illegally imposed and involuntarily paid taxes may be recovered back by the taxpayer. *Texas Land & Cattle Co. v. Hemphill County*, 61 S. W. 333, 334 (*Tex. Cir. App.* 1901).

The only one of the old cases relied upon by Appellant that has been cited by later Texas Courts with any frequency is *Daugherty v. Thompson*, 71 *Tex.* 192, 9 S. W. 99 (1888). First, as above indicated, it was cited in *State v. Taylor* and *Trammell v. Faught*, both *supra*. It has been cited several times for the proposition that county school lands are not subject to taxation, even to a lessee under a lease from the county. *Davis v. Burnett*, 77 *Tex.* 4, 13 S. W. 613 (1890); *Continental Land & Cattle Co. v. Board*, 80 *Tex.* 491, 16 S. W. 312 (1891); *Taber v. State*, 85 S. W. 835, 837 (*Tex. Cir. App.* 1905, *error refused*); *Montgomery v. Peach River Lumber Co.*, 117 S. W. 1061, 1063 (*Tex. Cir. App.* 1909) (specifically limiting the holding of the earlier case to this point). It has also been cited for the proposition that property exempted from taxation by the Constitution cannot be taxed by the legislature. *City of Abilene v. State*, 113 S. W. 2d 631, 635 (*Tex. Cir. App.* 1937, *error dismissed*); *A. & M. Consolidated Independent School District v. City of Bryan*, 143 *Tex.* 350, 184 S. W. 2d 914 (1945); *Lower Colorado River Authority v. Chemical Bank & Trust Co.*, 144 *Tex.* 333, 190 S. W. 2d 48 (1945). *Daugherty v. Thompson* has been discussed in one other Texas case, but there it was merely disposed of as not being applicable to the questions there presented. *Big Lake Oil Co. v. Reagan County*, 217 S. W. 2d 171 (*Tex. Cir. App.*

1948, error refused). Thus, the dictum in *Daugherty v. Thompson* has found favor with no Texas Court since 1889, and as the Supreme Court of Texas held in the present case, the validity of the real holding of the case was destroyed by an amendment to the Texas Constitution in 1927. (R. 188.)

### **C. The Right of Use and Occupancy is a Property Right, Subject to Taxation as Such**

Appellee believes that a large part of the argument of Appellant in this case is directed toward questions that are in fact insubstantial. First, Appellee believes that there is no real question but that the tax imposed in this case is not a tax on government property, but is a tax upon the private property interest of a private corporation consisting of the right to the use and occupancy of such government property. This was the holding of the Supreme Court of Texas. (R. 188-189.) The parties to this controversy both understand that it was the private property interest of Appellant that was being subjected to taxation. (R. 149.) The pleadings of the Appellee reflect that the property interest against which the tax was being assessed was the private property interest of Appellant. (R. 22.)

In this connection, it has many times been held that a right of use and possession is a taxable interest, and taxable under the same laws that tax other property interests. *Trimble v. City of Seattle*, 231 U. S. 683 (1914); *Modler v. Gormley*, 44 Wash. 465, 87 Pac. 506 (1906); *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253



(1956); *Kaiser Company, Inc. v. Reid*, 39 Cal. 2d 610, 184 P. 2d 879 (1947); *Bragg Investment Company, Inc. v. Cumberland County*, 245 N. C. 492, 96 S. E. 2d 341 (1957); *Conley Housing Corporation v. Coleman*, 211 Ga. 835, 89 S. E. 2d 482 (1955); *Meade Heights, Inc. v. State Tax Commission*, 202 Md. 20, 95 A. 2d 280 (1953); *Offut Housing Company v. County of Sarpy*, 160 Neb. 320, 70 N. W. 2d 382 (1955); *Sheridanville, Inc. v. Borough of Wrightstown*, 125 F. Supp. 743 (D. N. J. 1957); affirmed, *Fort Dix Apartments v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir. 1955), Cert. Denied, 351 U. S. 962 (1956); *City of Chicago v. University of Chicago*, 302 Ill. 455, 134 N. E. 723 (1922); *Missouri v. Personnel Housing, Inc.*, 306 S. W. 2d 506 (Missouri, 1957); *Kirtland Heights, Inc. v. Board of County Commissioners of Bernalillo County*, 64 N. M. 179, 326 P. 2d 672 (1958). Except for the first two cases just cited, all of the foregoing cases involve the taxation of a lessee, or of a user and occupier, of property owned by the United States, and the interest of such lessee, user, or occupier in such property was held to be a taxable property interest. Cases found which are to the contrary seem to turn on a question of State law in those situations where the local State law does not provide for taxation of the interest of a lessee of real property. See, for example, *Grumman Aircraft Engineering Corporation v. Board of Assessors of the Town of Rye Beach*, 2 N. Y. 2d 500, 171 N. E. 2d 794 (1957); *Squantum Gardens, Inc. v. Assessors of Quincy*, 235 Mass. 440, 140 N. E. 2d 482 (1957).

There are many situations where the United States owns some interest in a parcel of property, and some other

interest in the same property is owned by private persons. This Court has consistently held such private rights subject to taxation. *S. R. A. v. Minnesota*, 327 U. S. 558 (1946); *Baltimore Shipbuilding & Dry Dock Company v. Baltimore*, 195 U. S. 375 (1904); *Elder v. Wood*, 208 U. S. 226 (1908); *Bothwell v. Bingham County*, 237 U. S. 642 (1915); *City of New Brunswick v. United States*, 276 U. S. 547 (1928).

Secondly, if it is assumed that the tax is in fact levied against a private interest; and not against the federal property, then it must also be found and held by this Court that there is no implied immunity from taxation of this private property, merely because it grows out of property owned by the United States. The tax immunity of the United States does not extend to the private persons with whom it deals even though the activity of such private person promotes some federal government activity. *Federal Compress & Warehouse Company v. McLean*, 291 U. S. 17 (1934); *Broad River Power Company v. Query*, 288 U. S. 178 (1933); *Susquehanna Power Company v. State Tax Commission of Maryland*, 283 U. S. 291 (1931). Further, although it may not be disputed that the United States may grant an immunity by legislation, it must also be recognized that such immunity may be waived by legislation, and that in this case Congress has settled the question of implied immunity by an express waiver and consent to state taxation of the lessee's interest in the property. *Act of August 5, 1947, ch. 493, 61 Stat. 774*. This Court has recognized the effectiveness of this Act to subject to State

taxation the interest of a lessee of such federal property. *Offutt Housing Company v. County of Sarpy*, 351 U. S. 253 (1956).

Further, it follows that if Congress has consented to taxation of the "lessee's interest" in the case of leases of federal property, such as that now before this Court, there is no question but that such taxation may be in accordance with applicable State laws, and that no uniformity of such taxation is required by federal law. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204 (1946). This case held that the normal assumption that Congress intends its laws to have the same consequences throughout the nation cannot be made, where Congress has subjected some interest in federal property to State and local taxation, knowing that the several States, and localities within them, have diverse methods of assessment, collection, and refunding, and that tax rates vary widely. Because of the express permission of Congress for State and local taxation of the lessee's interest in the property here under consideration, the State law concerning the nature of that interest, the method of its valuation, and other questions concerning it are not subject to being overridden by federal law.

#### **D. The Tax on the Lessee's Property Interest is Not Discriminatory**

Assuming that the foregoing authorities unquestionably settle the questions there raised, it follows that if there is any real question in this case, it is whether or not the Texas

statute in question, as applied, discriminates unconstitutionally against those who deal with the United States by using and occupying, under the conditions set forth in the statute, property of the United States, for their private purposes and for profit. The argument for discrimination, as raised by Appellant in this case, seems to be based upon the proposition that the Texas statute in question, when read alone and when not considered in connection with other applicable Texas taxing statutes, appears to impose a tax upon users and occupiers of federal property only, which tax would have no counterpart in the case of users or occupiers of property other than federal that is exempt from taxation in the hands of the owner.

In determining the question of whether or not a statute discriminates unconstitutionally against those who deal with the United States, it is not sufficient to say merely that the tax does in fact, by its terms, apply only to those who deal with the United States. There are many Texas statutes that, by their terms, apply only to a limited class of property. One statute applies only to livestock, *Article 7155, Revised Civil Statutes of Texas*. Another applies only to securities deposited with the State, *Article 7158, Revised Civil Statutes of Texas*. Another applies to the taxation of railroads and telegraphs, *Article 7159, Revised Civil Statutes of Texas*. There is a special statute for the taxation of personal property, *Article 7165, Revised Civil Statutes of Texas*, and real property, *Article 7166, Revised Civil Statutes of Texas*, of banks. It is necessary, in construing such special statutes, to consider them as a part

of a whole—the taxing system of the state. *Caskey Baking Co., Inc. v. Virginia*, 313 U. S. 117 (1941).

A taxing statute should not be held to be discriminatory against those who deal with the United States, if it is enacted to levy a tax specifically authorized by Congress. Where, for example, Congress has consented to the taxation of the real property of national banks, the Reconstruction Finance Corporation, Federal Savings and Loan Associations, and other federal agencies, it should not be held that a state has enacted a discriminatory statute when it provides, by statute, for the taxation of such property. Under State Law, special enabling legislation might be required in order to accept the benefits of the Congressional consent.

Again, in this connection, substance and not form should be the controlling consideration. The New Jersey statute is considered in *Sheridanville, Inc. v. Borough of Wrightstown*, 125 F. Supp. 743 (D. N. J. 1954). As quoted in the opinion, the New Jersey statute appears to be broad enough to cover all real estate exempt from taxation that is leased to one whose property is not exempt. However, as the court notes immediately thereafter, although this statute contains broad language, its apparent purpose was to provide for the taxation of property leased from the United States, as is reflected by the statement of purpose attached to the statute when introduced in the New Jersey legislature, which statement of purpose is set forth in the margin.

(125 F. Supp. 749.) In spite of this recognition of the fact that lessees of federal property were the object of the legislation, the holding of the district court that the property was taxable was affirmed by the Court of Appeals, *Fort Dix Apartments v. Borough of Wrightstown*, 225 F. 2d 473 (3rd Cir. 1955), and this Court denied certiorari, 351 U. S. 962 (1956).

Perhaps the same vice, if it is a vice, could be laid at the feet of the Michigan statute that has been approved by this Court in the 1958 Michigan cases. As in the case of the New Jersey statute, the Michigan statute purports, by its terms, to apply to property other than federal, but the real purpose of the statute is revealed as having been to secure taxation of private interests in federal property, as reflected by the statement of counsel at page 58 of the Record in this Court in *United States of America v. Township of Muskegon*, and *Continental Motors Corporation v. Township of Muskegon*, as follows:

"Act 189 of 1953 was obviously a remedial or curative Statute designed to supplement the General Property Tax Act and amounting to an amendment thereto. It arose because of a claim then being asserted that this and other similar properties in the State had become exempt or would become exempt within the near future by transfer of title thereto from RFC to the United States or some agency exempt from taxation. The Act was passed to avoid the disastrous consequences upon the local units of government." (R. 58, Nos. 564 and 565, *Supreme Court of the United States*, October Term, 1956.)



This avowed purpose for the enactment of the Michigan statute seems well substantiated by the fact that the statute itself exempts from its terms property used by way of a concession in or relative to the use of a public airport, park, market, fair ground, or other similar property which is available to the use of the general public, as well as federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed, and property of any State-supported educational institution. *Public Act 189, 1953, 6 Mich. Stat. Ann. 1950-1957 Cum. Supp., Sections 7.7(5) and (6)*. The limited application of such a statute to property other than federal appears obvious. Certainly, an identical statute in the State of Texas would have little, if any, application to property other than federal. As is shown elsewhere in this brief, practically all property that is usually exempt from taxation in the hands of the owner, and when used by the owner for a public purpose, loses its exemption when it is leased or otherwise used with a view to profit, and there is no showing anywhere in the record of this case that any exempt property in the State is leased for profit without losing its exemption. Appellant speaks of discrimination, but none in fact has been shown, and no testimony or other showing in the record in this case reflects any discrimination in fact, or shows that any other lessee, user, or occupier of exempt property in this State, for profit, fails to pay either a direct tax, or an indirect tax in the way of increased rent to a tax-paying landlord.

### **E. The Immunity of the United States Does Not Extend to Appellant as User and Occupier of Government Property**

*McCulloch v. Maryland*, 4 Wheat. 316 (1819), was the decision of this Court that first announced the doctrines of intergovernmental tax immunity that are supposed to have guided the Court in every decision since that time. In fact, however, the doctrines there set forth have been distorted beyond recognition in many cases, as has been since recognized by this Court. See the opinion of Mr. Justice Rutledge in *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 312, 367 (1949). A trend that might be called a return to "orthodoxy" was begun, according to Professor Powell's analysis, with this Court's 1937 term. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 633 (1945).

One of the leading cases in this reversal of direction was *Helvering v. Mountain Producers Corporation*, 303 U. S. 312 (1938). The decision in that case was later characterized by this Court, in *Oklahoma Tax Commission v. Texas Company*, *supra*, as follows:

"The Mountain Producers case was not decided on narrow, merely technical or presumptive grounds. Its very foundation was a repudiation of those insubstantial bases for securing broad private tax exemptions, unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national. The decision came as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax." (*Id.*, 336 U. S. 367.)

To revert for the moment to *McCulloch v. Maryland*, it is remembered that the question there presented concerned the validity of a State tax that was designed purely and simply as an implement of destruction or damage to a federal instrumentality. The State of Maryland was attempting to obstruct the organization and operation of national banks within that State. In striking down the tax, Chief Justice Marshall stated the most famous of all aphorisms in this area of the law:

"The power to tax involves the power to destroy."  
*(Id., 4 Wheat. 431.)*

The method whereby this aphorism was adapted to broaden the scope of immunity from taxation may be illustrated by *Indian Territory Illuminating Oil Company v. Oklahoma*, 240 U.S. 522 (1916), holding that an oil and gas lessee of Indian Lands could not be required to pay taxes on the value of such leases, where the court said: "A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them." (240 U.S. 539.) This philosophy provided the decisions for many years, as this Court well knows, and this brief will not be further extended with a citation of the history of such extension of the doctrine of immunity, when applied to private persons dealing with the government.

*McCulloch v. Maryland* decided only one thing that is pertinent here, however, and that was that the instrumentalities of the federal government were immune from taxation by the States. "The court has bestowed upon this subject its most deliberate consideration. The result is a

conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." (*Wheat*, 136.) Thus, it was a return to orthodoxy when this shield of immunity from State taxation was restored to its rightful place, protecting the United States from State taxation but not also those private persons who merely dealt with the United States. *James v. Dravo Contracting Company*, 302 U. S. 134 (1937); *S. R. A. v. Minnesota*, 327 U. S. 558 (1946); *Alabama v. King & Booker*, 314 U. S. 1 (1941); *Hogdonford v. Silas Mason Company, Inc.*, 300 U. S. 577 (1937); *Hedberg v. Mountain Producers Corporation*, 303 U. S. 376 (1938); *Oklahoma Tax Commission v. Texas Company*, 336 U. S. 372 (1949); *Fox Film Corporation v. Doyal*, 286 U. S. 123 (1932); *Graves v. New York, ex rel O'Keefe*, 306 U. S. 466 (1939).

Professor Powell has given us a very complete and scholarly analysis of the course of the decisions of this Court, through the year 1944, that restricted the doctrine of immunity to those situations more directly affecting the United States itself. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 633 (1945). But in a succeeding article, he also examines what he chooses to call *The Remnant of Intergovernmental Tax Immunities*, 58 HARVARD LAW REVIEW 757 (1945). It is in this second article that he chose to analyze *United States v. Algebony County*, 322 U. S. 174 (1944).

On page after page he attempts to determine why it is that this case seems to mark a change in the trend established in the 1937 term and continuing, almost without interruption to *Allegheny County*. After discussing and discarding a number of different possible reasons for the distinction between the holding in this case and that in the earlier cases, he finally concluded that, in all probability, the distinction was based upon the fact that the State attempt to tax was directed against property, and not merely against a transaction, and that in the inter-governmental field property may be psychologically regarded as more closely part and parcel of the government than are mere transactions. 58 HARVARD LAW REVIEW 787.

Whether or not the analysis made by Professor Powell is accurate may be open to serious question and considerable speculation. Certainly it is at least true that the question that seemed to give the Court the most pause in *Allegheny County* was whether or not the State tax was laid on property of the United States. Certainly, also, it is clear that the decision was not based upon a finding that the tax was laid directly upon the government property in the hands of the government, because, in form at least, the attempt was being made to tax the private citizen, as a bailee of the government property.

If, however, Professor Powell is correct in his belief that the result in *Allegheny County* was different from that in the earlier cases because of the fact that government property was involved in the questioned tax, then it

would seem clear that such distinction has been swept away by the 1958 Michigan cases, because all three dealt with taxation of a private citizen as a bailee of government property. Both the distinction finally arrived at by Professor Powell, and the belief of Appellee here that this distinction was effectively wiped out by the Michigan cases is apparently shared by Mr. Justice Harlan, as reflected in his separate opinion in the Michigan cases, 355 U. S. 506, 508-10.

Appellee believes that if the distinction between the Michigan cases and *Allgheny County* is that in the one case there was a privilege or use tax, and in the other there was a property tax, then that this distinction should be done away with once and for all, as an insubstantial distinction not based upon any real difference. What difference should there be between a privilege tax upon the right of use and possession, and a property tax upon such right of use and possession, when, under applicable State law, such right of use and possession is deemed a property interest? And, what difference is there between the tax assessed by the State of Texas, and its political subdivisions, as shown in the present case, and the tax assessed by the State of Michigan in *United States and Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958)? Laying aside for the moment, the question of discrimination because the taxes applies only to federal property, there can be no doubt that the taxes are essentially identical, and that the decision in this case should be governed by the Michigan cases.



From the standpoint of simple justice and fairness, one in the position of Appellant in this case is hard put to argue that it should not be subject to taxation on its right of use and occupancy of the federal property. Appellant is a private corporation, conducting its private business for profit. The lease of the federal property here in question (R. 52-89) provides that for a term of 15 years, with two five-year options for extension, Appellant shall have the right to use the property for its private purposes. (The "re-capture" provisions of the lease are immaterial in view of the fact that the Texas Supreme Court did not predicate taxability upon the existence of the right of use and occupancy for any particular period of time.)

As consideration for this right of use and occupancy for the conduct of its private business, Appellant agreed to pay to the United States an annual rental of \$1,026,666.67. (R. 54.) It may, perhaps, be safely assumed that this figure is not more than the reasonable rental value of the property. The taxes assessed and levied by Appellee on the interest of Appellant in this property, as shown by the pleadings (R. 23-25) vary from approximately \$41,000.00 to approximately \$67,500.00 per year. These claimed taxes are not inconsequential, of course, but proportionately, the payment of these taxes would add very little to the agreed rental. During the five years that are in controversy in this case, the taxes assessed, according to the pleadings, would amount to approximately \$273,000.00.

During this same period, and while Appellant was paying no taxes to the school district, the district was furnish-

ing educational facilities for the children of the employees of the plant, and not having conceived that the property interest of Appellant might be subject to taxation, was receiving federal aid by reason of the impact of such plant upon the school district. (R. 29-32.) During this period, the United States paid to Appellee, as such federal aid, approximately \$188,000.00. Thus, during this period, unless the present tax is validated by this Court, Appellant will have been receiving "the benefits of local government" while failing to "share the burdens" thereof. *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799 (1956). While Appellant's tax-paying competitors were paying their share of the burdens of local government, Appellant was receiving the benefits of local government while sending the bill for a part of these benefits to the United States and its tax-payers. The Michigan Court called such a situation "discrimination", *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799 (1956); *United States and Borg-Warner Corporation v. City of Detroit*, 345 Mich. 601, 77 N. W. 2d 79 (1956), while Appellant argues here that discrimination appears only when it is required to pay the taxes which its competitors pay. There is no question but that Appellant, in the conduct of its private business, competes with others who pay their fair share of the taxes that provide the means of local government, and that the State of Texas and its local instrumentalities provide both

to Appellant and its competitors equal opportunities, protection and benefits. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 455 (1940). Under these circumstances, discrimination appears only if Appellant is contrasted with other "lessees", in a technical sense, rather than with other business enterprises with which it competes.

The record in this case, specifically including the lease contract itself (R. 52-89), clearly shows that during the lease term, Appellant has the full beneficial use of the leased property. Under these circumstances, as this Court has said, "Taxation is not so much concerned with the refinements of title as it is with command over the property taxed—the actual benefit for which the tax is paid." *Corliss v. Bowers*, 281 U. S. 376, 378 (1930). Any right or privilege that is a constituent of ownership may be subjected to taxation. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 279, 297 (1933). There is no bar to taxation against a person, as if he were the owner when he enjoys such substantial privileges and benefits in the property as to make it reasonable and just to so consider him. *Barnet v. Wells*, 289 U. S. 670, 678 (1933). The test is whether the concept of taxation, and "ownership" for tax purposes, is one that an enlightened legislator might act upon without affront to justice. *Barnet v. Wells*, *supra*; *International Harvester Credit Corporation v. Goodrich*, 350 U. S. 537, 5 (1956). Appellee believes that the tax now before this Court passes this test.

## CONCLUSION

Wherefore, Appellee respectfully urges that the judgment of the Supreme Court of Texas be in all things affirmed.

Respectfully submitted,

JAMES W. WITHERSPOON,

JOHN D. AIKIN,

WAYNE E. THOMAS,

EARNEST L. LANGLEY,

Box 473,

Hereford, Texas,

*Attorneys for Appellee,*

*Dumas Independent School*

*District.*

October 15, 1959.

## APPENDIX

RESTRICTIONS ON AND LOSS OF EXEMPTION  
FROM TAXATION UNDER THE TEXAS  
TAXING SYSTEM

(a) Land owned by the state, and sold to private entities or persons on long-term contracts, such as land sold under the Veterans' Land Board Program, is taxable to the purchaser, even where legal title to the land remains in the state until it is fully paid for. *Articles 5421m and 7173, Revised Civil Statutes of Texas; Childress County v. State, 127 Tex. 343, 92 S. W. 2d 1011 (1936).*

(b) Where the State of Texas executed a contract to have oil wells drilled in the bed of a navigable stream, agreeing to pay the cost thereof out of a share of production, it was held that such consideration constituted an oil payment subject to taxation in the hands of the contractor. *American Liberty Oil Company v. State, 197 S. W. 2d 381 (Tex. Civ. App. 1946, error refused, n. r. e.).*

(c) To be exempt from taxation, property owned by a church for its minister's residence must be exclusively so used, must yield "no revenue whatever," must be no larger than reasonably necessary, and in no event can it be larger than one acre. *Articles 7150 (1), 7150b, Revised Civil Statutes of Texas.*

(d) To be exempt from taxation, the property of public colleges and academies must be owned and used exclusively for school purposes. *Article 7150(1), Revised Civil Statutes of Texas.*

(e) To be exempt from taxation, the endowment funds of institutions of learning and religion must not be "used with a view to profit." *Article 7150(1), Revised Civil Statutes of Texas.*

(f) A school loses its tax exempt status when not used exclusively for school purposes, as where it is used in part as a residence for the owners, or as a farm. *Edmunds v. City of San Antonio*, 36 S. W. 495 (*Tex. Civ. App.* 1896, *error refused*); *St. Edwards College v. Morris*, 82 *Tex.* 1, 17 S. W. 512 (1891).

(g) Even where property is used exclusively for school purposes, it is not exempt unless the property itself is owned by the institution or person conducting the school. *Smith v. Feather*, 149 *Tex.* 402, 234 S. W. 2d 418 (1950).

(h) School land owned by the Counties of the State of Texas is subject to all taxes except State taxes; that is, it can be taxed by other counties, by cities, school districts, water and reclamation districts, and other taxing bodies. *Section 6a, Article VII, Constitution of Texas; Article 7150a, Revised Civil Statutes of Texas.* While this constitutional provision appears to limit this taxation to agriculture or grazing school land only, in fact there is no school land of any other type, because the act setting apart such land to the counties for school purposes provided that such land would be agricultural or grazing land. *Act of March 26, 1881, 9th General, Laws of the State of Texas 157.* Actually, all county school lands were appropriated and set apart for the use and benefit of the counties before the time that any attempt was made by the legislature to clas-



sify land for other than agricultural and grazing purposes. The first such classification act was the *Act of April 17, 1883, 9 Gammel, Laws of the State of Texas 391*.

(i) The State Constitution provides that the property of counties, cities, and towns, is exempt from taxation, but only when it is owned and held *only* for public purposes. *Section 9, Article XI, Constitution of Texas*. The Constitution further provides that the legislature may, by general laws, exempt from taxation, public property *used for public purposes*. *Section 2, Article VIII, Constitution of Texas*. To the extent that the statute (*Article 7150(1), Revised Civil Statutes of Texas*) does not limit the exemption to property so owned and held for public purposes, it is beyond the power of the legislature and is unconstitutional. *City of Abilene v. State, 113 S. W. 2d 631 (Tex. Civ. App. 1937, error dismissed)*.

(j) The exemption from taxation of charitable institutions extends only to real property, and does not include personal property. *Article 7150(7), Revised Civil Statutes of Texas; Texas Attorney General's Opinion No. 0-5599*.

(k) Although the Texas legislature has purported to exempt some of the property of fraternal benefit societies, declaring them to be charitable and benevolent institutions, it has been held by the courts that issuance of insurance to its members disqualifies an institution as an institution of purely public charity, and the Attorney General has declared the statute unconstitutional. *Article 10.39, Insurance Code of Texas; Texas Attorney General's Opinion No.*

0-5226; *Concho Camp W. O. W. v. City of San Angelo*, 231 S. W. 1106 (Tex. Cir. App. 1921).

(l) The leasehold interest of a corporation which erects housing projects on military reservations is subject to taxation. *Texas Attorney General's Opinion No. S-124*; See *Offutt Housing Company v. County of Sarpy*, 351 U. S. 290 (1956).

(m) Lands set apart for the endowment of the University of Texas are subject to taxation for county purposes in the counties in which they are located, to the same extent as lands privately owned in such counties. *Article 7150c, Revised Civil Statutes of Texas*. The continued exemption of such lands from State taxation merely prevents the state from having to appropriate money to pay to itself, and the continuing exemption from taxation for school purposes merely prevents one part of the public school system from paying taxes to another part thereof.

(n) When a tax exemption expires during the year, or when a property loses its exempt status during the year, the property becomes subject to taxation for the balance of the year, on a pro rata basis, and if land is condemned by the power of eminent domain during the year, its tax status is determined by its ownership on January 1. *Article 7151, Revised Civil Statutes of Texas*; *State of Texas v. Moody's Estate*, 156 F. 2d 698 (5th Cir. 1946); *Childress County v. State*, 127 Tex. 343, 92 S. W. 2d 1011 (1936).

(o) The property of a municipal housing authority is declared to be "public property used for essential public

and governmental purposes" and is exempted from taxation; but such housing authorities are given express permission to make payments in lieu of taxes to political subdivisions that furnish improvements, services, or facilities, to the extent of the cost thereof. *Article 1269k (22), Revised Civil Statutes of Texas; Housing Authority of City of Dallas v. Higginbotham*, 145 Tex. 158, 143 S. W. 2d 29 (1940).

(p) Although one of the eleven Texas Courts of Civil appeals has held that revenue-producing property of a school is tax exempt, *State v. University of Houston*, 264 S. W. 2d 153 (Tex. Civ. App. 1954, error refused, n. p. c.), this case stands alone, seems to be in conflict with other decisions, and has been questioned by the Executive Assistant to the Texas Attorney General, Geppert, *A Discussion of Tax Exempt Property in the State of Texas*, 11 *Baylor Law Review* 144, 142 (1959). The State urged the taxability of the property in this litigation.

(q) By statute, the property of certain veterans' organizations is exempted from taxation; but only when "not leased or otherwise used with a view to profit." *Article 2150 (20), Revised Civil Statutes of Texas*. However, unless such organizations conduct their affairs so as to be "institutions of purely public charity," the exemption is unconstitutional as to them. *Section 2, Article VIII, Constitution of Texas; Texas Attorney General's Opinions Nos. 6-2011 and S-201*.

(r) To be exempt from taxation under the statute, property of an institution of purely public charity must be both owned and used exclusively for public charitable

purposes by such institution; and the exemption from taxation is lost if the use is shared, even by one paying no rent, or even if any rent received is devoted to the charitable purposes of the institution. *Article 7150(7), Revised Civil Statutes of Texas; City of Houston v. Scottish Rite Benevolent Association*, 111 Tex. 191, 230 S. W. 978 (1921).

(c) It has been held that farm property owned and used by a public college was not exempt from taxation, even though it produced no revenue or profit, and was operated only to supply the tables at the school boarding house. Such property was not used exclusively for school purposes. *St. Edwards College v. Morris*, 82 Tex. 1, 17 S. W. 512 (1891).

(d) A statute of the State of Texas provides that toll road property will be exempt from taxation if the owner irrevocably pledges to convey it to the State as soon as the property is paid for, but it has been held that the statute is ineffective to create the exemption, because even though such statute declares the property to be, for tax purposes, "publicly owned," it is not so in fact. *Article 6671c, Revised Civil Statutes of Texas; Texas Turnpike Company v. Dallas County*, 151 Tex. 171, 221 S. W. 2d 100 (1951).

(e) Agricultural demonstration farms are exempt from taxation only when no charge is made for demonstration work, when they are not operated or used with a view to profit, and when all income in excess of that required for maintenance and operation is "used and bound for the use

of other institutions of public charity." *Article 7150(16), Revised Civil Statutes of Texas.*

(v) State prison property is subject to taxation for school purposes. *Article 7150(17)(18), Revised Civil Statutes of Texas.*

(w) State farms employing convict labor are not exempt from county and school district taxes. *Article 7150(4), Revised Civil Statutes of Texas.*

(x) The Texas Employers' Insurance Association, a creature of and an agency of the State, is not exempt from taxation on its property, because it performs a function that is similar to that of a private insurance company. *Texas Employers' Insurance Association v. City of Dallas, 5 S. W. 2d 614 (Tex. Civ. App. 1928, error refused).*

(y) The tax exemption of municipalities in Texas is limited to ad valorem, income, and occupation taxes, and they are liable for motor fuel and other excise taxes. *State v. City of El Paso, 135 Tex. 359, 143 S. W. 2d 366 (1940).*

OCT 21 1959  
JAMES R. BROWNING, Clerk

No. 40

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1959

**PHILLIPS CHEMICAL COMPANY,**

*Appellant,*

*v.*

**DUMAS INDEPENDENT SCHOOL DISTRICT,**

*Appellee.*

*On Appeal From the Supreme Court  
of the State of Texas*

**BRIEF FOR THE STATE OF TEXAS  
AS AMICUS CURIAE**

**WILL WILSON**

Attorney General of Texas

**W. V. GEPPERT**

Executive Assistant Attorney  
General

**JACK N. PRICE**

Assistant Attorney General  
Capitol Station  
Austin, Texas



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No. 40

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1959

PHILLIPS CHEMICAL COMPANY,

*Appellant.*

v.

DUMAS INDEPENDENT SCHOOL DISTRICT,

*Appellee.*

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*On Appeal From the Supreme Court  
of the State of Texas*

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**BRIEF FOR THE STATE OF TEXAS  
AS AMICUS CURIAE**

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**Opinions Below**

The opinion of the Supreme Court of Texas (R. 177-203) is reported at 316 S. W. 2d 382. The Opinion of the Texas Court of Civil Appeals for the Seventh Judicial District (R. 165-170) is reported at 307 S. W. 2d 605. The District Court of Moore County, Texas, issued no written opinion; its judgment is contained at R. 38-48.

**Jurisdiction**

Jurisdiction is properly laid in this Court. The facts stated in Appellant's Statement of Jurisdiction are correct.

### **Statute Involved**

Article 5248, Tex.Rev.Civ.Stat.1925, as amended by Ch. 37, Tex. Sess. Laws 1950, 51st Leg., 1st C. S., is directly involved in this case. The pertinent portions thereof are as follows:

"The United States shall be secure in their possession and enjoyment of all lands acquired under the provisions of this title; and such lands and all improvements thereon shall be exempt from any taxation under the authority of this State so long as the same are held, owned, used and occupied by the United States for the purposes expressed in this title and not otherwise; provided, however, that any personal property located on said lands, which is privately owned by any person, firm, association of persons or corporation shall be subject to taxation by this State and its political subdivisions; and provided, further, that any portion of said lands and improvements which is used and occupied by any person, firm, association of persons or corporation in its private capacity, or which is being used or occupied in the conduct of any private business or enterprise, shall be subject to taxation by this State and its political subdivisions."

### **Questions Presented**

This case is concerned with the effect of the taxes imposed by Art. 5248, Tex.Rev.Civ.Stat., 1925, as amended by Ch. 37, Tex. Sess. Laws 1950, 51st Leg., 1st C.S., upon lessees of Federal property. The Appellant propounds three questions (Appellant's Brief, 4-5):

"1. Whether Chapter 37 is, as here applied, repugnant to the Constitution of the United States and invalid because it discriminates against the United States and those with whom it deals, imposes an unconstitutional burden on the activities of the Federal Government and infringes upon its sovereignty.

"2. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid as violative of the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it constitutes discriminatory and arbitrary class legislation against lessees of Federal property.

"3. Whether Chapter 37 is repugnant to the Constitution of the United States and invalid because it taxes to Phillips certain property, which is owned, not by Phillips, but by the United States and on which the State, since Congress has not assented thereto, may not assess taxes."

As argued in the Appellant's Brief, the questions are resolved to two:

1. Whether the tax imposed by Art. 5248, Tex. Rev.Civ.Stat. 1925, as amended, unconstitutionally discriminates against the United States or its lessees.

2. Whether the tax imposed by Art. 5248, Tex. Rev.Civ.Stat. 1925, as amended, constitutes an ad valorem tax upon Federal property.

### **Statement**

The statement of the facts and history of this case contained in the brief for the United States as

*amicus curiae* is correct, Appellant's statement is substantially correct, but must be qualified in two respects.

In the third paragraph of its statement, Appellant says:

" . . . the local assessor assessed and placed the Ordinance Works upon the tax rolls in the name of Phillips Chemical Company as owner of the property and the School District sought to collect from Phillips the taxes thus assessed . . . ."

This wording implies that the property belonging to the United States Government was assessed for taxation in the name of the Appellant. The property assessed was the Appellant's leasehold interest, a fact amply evidenced by the record and clearly understood by the Phillips Chemical Company. (R. 144, 133, 149, 152).

Appellant also states that the Texas Supreme Court held that the 1950 Texas Statute (Ch. 37, Tex. Sess. Laws, 1950, 51st Leg., 1st C. S.) subjected Phillips to taxation for the full fee value of the government owned Ordinance Works. The Texas Supreme Court did not so hold; at the instance of the Appellant the question of the proper valuation of the leasehold interest for the purpose of taxation was segregated from the question of taxability, *vel non*, of such interest. (R. 37-38). Although there is language in the decision of the Texas Court of Civil Appeals and in the decision of the Supreme Court of Texas indicating that Appellant's interest was properly assessed at the full fee value of the property, (which

language will doubtless be persuasive when the question of value is directly presented for decision) this question has not yet been expressly decided; consequently, the decision of this Court on the questions presented cannot turn on the point of improper valuation of the leasehold interest. However, since it is the earnest contention of the State of Texas that the value of the entire fee is the proper measure of value in assessing Appellant's leasehold for taxation, and that this method of valuation does not render the tax discriminatory, nor make it an unlawful exaction or a prohibited burden upon the property or activities of the Federal Government, this brief will reply to the arguments of the Appellant based on the assumption that the question of value has been decided as expressed in Appellant's Brief. But, it must be emphasized that should this Court decide that Art. 5248, Tex.Rev.Civ.Stat. 1925, levies a valid tax upon the interest of lessees of Federal property, but that valuation of the interest at the fee value of the property renders the tax discriminatory or an unlawful burden on the Federal Government, the decision below must still be upheld.

## Argument

### I

## **THE TAX DOES NOT UNCONSTITUTIONALLY DISCRIMINATE AGAINST THE UNITED STATES OR ITS LESSEES.**

The property involved in this case, known as the Cactus Ordinance Works, is one of approximately



1200 industrial plants constructed by the United States Government during World War II. Under the Military Leasing Act, many of such plants, including the Cactus Ordinance Works, are being held for profit by private industries under long term leases. The Federal Government has expressly consented to taxation of the interests created by such leases. Act of August 5, 1947, Public Law 364, 80th Congress (codified in 10 U.S.C.A., 1270d.) Consequently, taxability, *vel non*, of Appellants interest in the Cactus Ordinance Works is not open to question. The Dumas Independent School District assessed said interest for taxation under the authority of Art. 5248, Tex.Rev.Civ.Stat. 1925. Appellant contends that the tax thus assessed constitutes an ad valorem tax on Federal property and is discriminatory against the Government and those with whom it deals.

The questions raised by this Appeal are of utmost importance. This Court's opinion will seriously affect future ad valorem taxation by a great number of the counties, school districts and other taxing authorities of the State.

It is the firm belief of the State of Texas that the tax assessed by the Dumas Independent School District against the leasehold interest of the Phillips Chemical Company is not a tax upon Government property, and that it does not unconstitutionally discriminate against the United States or those with whom it deals. In accordance with the order established by the Appellant, the question of discrimination will be discussed first.

## **Delineation of The Different Tax Treatment of Federal and State Lessees:**

In order to properly evaluate Appellant's argument that Art. 5248, Tex. Rev. Civ. Stat. 1925, is discriminatory, it is necessary that the exemption from taxation accorded various types of property by the laws of the State of Texas be reviewed.

The Texas Constitution provides that all property in the State, other than municipal, shall be taxed in proportion to its value. Tex. Const. Art. VIII, Sec. 1. In view of this provision, all exemptions of property in Texas, other than the exemption accorded property of the Federal Government, must find sanction in the Texas Constitution.

Article XI, Sec. 9, Tex. Const., expressly exempts publicly held property in the following language:

"Sec. 9. The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds, and all other property devoted

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In actuality, the exemption of Federal property from State taxation is granted by Sec. 4 of Art. 7150, Tex. Rev. Civ. Stat. 1925, enacted pursuant to Art. VIII, Sec. 2, Tex. Const. But it goes without saying that such property would be exempt even in the absence of this provision, such exemption being grounded in the theory of inter-governmental immunity from taxation originally propounded by the case of *McCulloch v. Maryland*, 4 Wheat. 316 4 L. Ed. 579 (1819).

exclusively to the use and benefit of the public shall be exempt from forced sale and taxation,

Article VIII, Sec. 19, Tex. Const., exempts from taxation farm products and family supplies. Sec. 1-b of Article VIII, Tex. Const., exempts \$3,000 of the assessed taxable value of residence homesteads from taxation for State purposes; Section 1 of the same article exempts household and kitchen furniture in the amount of \$250.

All other exemptions from taxation stem from the provisions of Section 2 of Article VIII of the Texas Constitution, which specifies certain types of property the Legislature may exempt from property taxation, and provides that all other exemptions shall be null and void. This Section reads as follows:

"All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax; but the legislature may, by general laws, exempt from taxation public property used for public purposes; actual places or [of] religious worship; also any property owned by a church or by a strictly religious society for the exclusive use as a dwelling place for the ministry of such church or religious society, and which yields no revenue whatever to such church or religious society; provided that such exemption shall not

As is readily apparent, the foregoing exemptions are personal to the possessor of the property described, and have no relation whatsoever to the point in issue in the instant case; consequently, these provisions will not be further discussed.

extend to more property than is reasonably necessary for a dwelling place and in no event more than one acre of land; places of burial not held for private or corporate profit; all buildings used exclusively and owned by persons or associations of persons for school purposes and the necessary furniture of all schools, and all property used exclusively and reasonably necessary in conducting any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women, operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit; and when the same are invested in bonds or mortgages, or in land or other property which has been and shall hereafter be bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer, and institutions of purely public charity; and all laws exempting property from taxation other than the property above mentioned shall be null and void."

The Legislature, acting under the authority of the Constitutional provisions above quoted, has enacted statutory exemptions from property taxes to the following:

(1) Property of schools and churches.

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Art. 7150, Sec. 1, Tex. Rev. Civ. Stat. 1925, and Art. 7150b, Tex. Rev. Civ. Stat. 1925. In order to qualify for

(2) Property of religious, educational and physical development associations owned or used exclusively in conducting any association engaged in the threefold religious, educational and physical development of boys, girls, young men and young women, and *not leased* or otherwise used with a view to profit.

(3) Cemeteries not used for profit.

(4) Property belonging to the State or any political subdivision thereof, or the United States.

(5) All lands, houses and buildings belonging to any county, precinct or town *used exclusively* for the support or accomodation of the poor.

(6) Real property *owned and used exclusively* by public charities *not leased or used for profit.* (Since the brief submitted by the United States Government as *amicus curiae* in the instant case makes the patently incorrect statement that property owned

exemption, school property must be owned by the institution or person conducting the school, and must be *used exclusively* for school purposes, *Edwards v. City of San Antonio*, 36 S.W. 195 (Tex. Civ. App. 1896, *overruled*); *Smith v. Feather*, 149 Tex. 102, 231 S. W. 2d 418 (1950); the property of a church, to be exempt, must (1) be used as an actual place of worship and (2) yield no revenue to the church or religious society, or (3) be used exclusively as a dwelling place for the ministers of the church. See commentary, "A Discussion of Tax-Exempt Property in the State of Texas," *Baylor Law Review*, Vol. XI, No. 2, page 110, et. seq.

\*Art. 7150, § 2a, Tex. Rev. Civ. Stat. 1925.

\*Art. 7150, § 3, Tex. Rev. Civ. Stat. 1925.

\*Art. 7150, § 4, Tex. Rev. Civ. Stat. 1925.

\*Art. 7150, § 6, Tex. Rev. Civ. Stat. 1925.

\*Art. 7150, § 7, Tex. Rev. Civ. Stat. 1925.

by charitable institutions is not taxed even though leased, and the Appellant's Brief implies as much, it must be emphasized that immediately upon being *leased or used for profit* such property loses its exemption and is taxed at its entire fee value to the owner thereof. See *Markham Hospital v. City of Longview*, 191 S. W. 2d 695 (Tex. Civ. App. 1945, error ref'd.); *City of Houston v. Scottish Rite Benev. Ass'n*, 111 Tex. 191, 230 S. W. 978 (1921).

(7) Public libraries and personal property belonging thereto.

(8) Market houses, public squares or other public grounds, town or precinct houses or halls, *used exclusively* for public purposes; and all works, machinery or fixtures belonging to any town used for conveying water to such town.

(9) Fire engines and other implements owned by towns and cities used for extinguishment of fires, and buildings *owned exclusively* for the safe-keeping thereof.

(10) Pensions granted by the State or the United States.

(11) Buffalo and catalo.

Art. 7159, § 8, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 9, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 10, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 12, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 13, Tex. Rev. Civ. Stat., 1925.



(12) All property belonging to art leagues and societies of fine arts *devoted wholly and without charge* to the promotion of education and learning.

(13) Property of the Boy Scouts and Girl Scouts *used exclusively* for the promotion of the religious, educational and physical development of the members thereof.

(14) Lands, buildings, personal property and endowments *used exclusively* by any person or association of persons for the maintenance and operation of demonstration farms for the purpose of teaching modern and scientific methods of farming to others, *without charge*, and *not operated with a view to profit*.

(15) County buildings used for jails, courts, or county offices.

(16) Fraternal benefit societies if not leased or used with a view to profit.

(17) Property of national banks exempted by the laws of the United States.

(18) Obligations of navigation districts.

Art. 7159, § 11, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 15; Art. 7170, Tex. Rev. Civ. Stat., 1925;

condition of exclusive use is imposed by Article VIII, § 2, Tex. Const.

Art. 7159, § 16, Tex. Rev. Civ. Stat., 1925.

Art. 7159, § 5, Tex. Rev. Civ. Stat., 1925.

Art. 1039, Tex. Ins. Code, 1951; again the condition of exclusive use cannot be leased or used for profit is imposed by Art. VIII, Sec. 2, Tex. Const.

\* Art. 7165, § 2, Tex. Rev. Civ. Stat., 1925.

Art. 8217a, § 11, Tex. Rev. Civ. Stat., 1925.

(19) Headquarters buildings of Texas Congress of Parent and Teachers owned and used exclusively by such association.

(20) Property of municipal housing authorities.

(21) Property of the Texas Federated Women's Clubs which is not *leased or used for profit* and which is *used exclusively* for one of the exempt purposes expressed in Art. VIII, Sec. 2, Tex. Const.

(22) Property of the American Legion and other veterans organizations which is not leased or used with a view to profit.

If the Legislature, in putting into effect the permission granted by the Texas Constitution to exempt certain types of property, goes beyond the authority granted or broadens the exemption so as to embrace institutions or property not contemplated by the framers of the Constitution, the statute is to that extent void, *Dickson v. Woodmen of*

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Art. 7150d, § 1, Tex. Rev. Civ. Stat., 1925; the requirements of ownership and exclusive use are imposed by Art. VIII, Sec. 2, Tex. Const.

Art. 1269k, § 22, Tex. Rev. Civ. Stat., 1925.

Art. 7150, § 19, Tex. Rev. Civ. Stat., 1925; the restrictions on use are imposed by the constitutional article.

Art. 7150, § 20, Tex. Rev. Civ. Stat., 1925; Attorney General's Opinion (Texas) No. 8-201, dated June 11, 1956, held that whether the American Legion and other veterans organizations are exempt from taxation as institutions of purely public charity, depends upon the manner in which such organization conducts its affairs; and that if, in fact, the Post does not qualify as an institution of "purely public charity" under Section 7 of Article 7150, Tex. Rev. Civ. Stat., 1925, it is not tax exempt.

*the World Life Insurance Society*, 280 S.W. 2d 315 (Tex. Civ. App. 1955, *error ref'd.*) It is the policy of the State of Texas that all property should be taxed unless it comes clearly within an exemption provided by law. *B.P.O.E. Lodge v. City of Houston*, 44 S. W. 2d 488 (Tex. Civ. App. 1931, *error ref'd.*) Tax exemptions are never favored, and in case of doubt as to whether the taxpayer has shown by the facts that he is entitled to the exemption the doubt must be resolved in favor of the taxing power and against the exemption. *Raymondville Memorial Hospital v. State*, 253 S.W. 2d 1012 (Tex. Civ. App. 1952, *error ref'd.*, *N.R.E.*) An examination of the categories of property enumerated above discloses that (exclusive of consideration of Federal property) there is only one class of property, exempt to its owner, that may be rented or leased for a non-exempt use without completely destroying the exemption, i.e., property belonging to the State or its political subdivisions. Subjecting any other type of exempt property to the type of lease involved in the instant case would have the immediate effect of destroying the exemption and causing the property to be taxable at the entire fee value to the owner.

Not even state owned property may be leased completely without limitation. The public purpose

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The laborious, detailed review contained above is included in this brief solely to illustrate this fact; the point cannot be over emphasized, since, as pointed out above, both the brief of the Appellant and the brief of the United States Government as *amici curiae* are misleading in the implication that property of exempt organizations other than the State of Texas remains exempt though leased.

of the property cannot be abandoned, and the revenue from the renting or leasing must inure to the public benefit. *State v. City of Beaumont*, 161 S.W. 2d 344 (Tex. Civ. App. 1942, *no writ history*); *City of Abilene v. State*, 113 S. W. 2d 631 (Tex. Civ. App. 1938, *error dismissed*.) Further, specific types of state owned property are taken out of the operation of the exemption. Art. VIII, Sec. 6a, Tex. Const., expressly provides that all agricultural or grazing school land granted to the several counties of this State shall be subject to taxation except for state purposes.<sup>20</sup> State farms employing convict labor on state account is subject to taxation for county and independent school district purposes, and the taxes are to be paid out of the General Revenue Fund of the State. Art. 7150, Sec. 4, Tex. Rev. Civ. Stat. 1925. All State prison property must bear its proportionate part of any bond tax of a public school district, and of any maintenance tax of a public school district within which the property of the state prison is located. Art. 7150, Secs. 17 and 18.

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<sup>20</sup>A word of explanation in reference to the Texas ad valorem tax structure is necessary at this point. The State of Texas in 1951 abandoned the ad valorem tax for general revenue purposes. Only counties, cities, independent school districts, and other districts created and gaining taxing authority pursuant to the Texas Constitution may levy, assess, and collect the ad valorem tax. However, the State of Texas receives \$0.35 per \$100.00 of county assessed valuation for the Permanent School Fund (Art VIII, Sec. 9, Tex. Const.), \$0.05 per \$100.00 of the taxes collected by the counties at the county assessed valuation for the College Building Fund, (Art. VII, Sec. 17, Tex. Const.), and \$0.02 per \$100.00 of the taxes collected by the counties at the county assessed valuation for the Confederate Pension Fund. (*Ibid*).

Tex.Rev.Civ.Stat. 1925. Lands set apart for the endowment of the University of Texas, an agency of the State of Texas, are subject to taxation for county purposes. Art. 7156, Tex.Rev.Civ.Stat. 1925.

The claim of discriminatory taxation must be examined in light of the foregoing. Obviously, there is no discrimination in favor of lessees of privately owned exempt property, since leasing of such property causes it to be taxable in fee to the owner. As stated by Mr. Justice Holmes in *Trimble v. City of Seattle*, 231 U.S. 683, (1914):

"In ordinary cases the whole property is taxed and what party shall bear the burden is not a matter of public concern. . . ."

See also *Daugherty v. Thompson*, 9 S.W. 99 (Tex. Sup. Ct., 1888). As pointed out in the *Trimble* case, the argument for inequality really works the other way, for if lessees of Federal property go untaxed, they become notably favored over lessees of exempt property belonging to private individuals, who are, in practical operation, on the same footing with lessees of non-exempt private property.

Any claim of discrimination must rest solely on the difference in tax treatment accorded lessees of Federal property and state owned property. (As

This case, heavily relied upon by Appellant as creating the condition requiring a finding of discriminatory taxation, recognize this proposition and also the fact that privately owned property leased for a non-exempt use loses its exemption entirely.

When used in this Brief, the word "State" refers to the State of Texas or any political subdivision thereof, and

evidenced by the preceding discussion, the latter category includes only state property not expressly made subject to taxation, where the public purpose thereof has not been abandoned and where the revenue from the leasing or renting inures exclusively to the public benefit.)

This difference in tax treatment warrants examination. Art. 7173, Tex. Rev. Civ. Stat. 1925, provides that property exempt to its owner leased for a period in excess of three years shall be taxed to the lessee; Art. 7174 provides that taxable leasehold interests shall be valued for taxing purposes at the fair market value of the lease.

The case of *Dougherty v. Thompson*, *supra*, held that property which is exempt by virtue of the mandatory provisions of the Texas Constitution could not be taxed even under Art. 7173 and 7174, Tex. Rev. Civ. Stat. 1925. Though this case is poorly reasoned and injected much confusing dictum into the law of Texas taxation, most of which has been disregarded by the Texas courts, its holding has not been directly overruled and must be reckoned with in categorizing, for tax purposes, privately held interests in state owned property. If this case be given a literal interpretation and following, lessees of property exempt from taxation by virtue of the mandatory provisions of Art. XI, Sec. 9, Tex. Const., would escape taxation. (Art. XI, Sec. 9, Tex. Const., has been construed, in effect, so as to encompass all state owned properties. See *Lower Colorado River*

the term "state owned property" includes property owned by the State or any such subdivision.



*Authority v. Chemical Bank & Trust Co.*, 144 Tex. 326, 190 S. W. 2d 48 (1945); *State v. University of Houston*, 264 S. W. 2d 153 (Tex. Civ. App. 1954, error *re'fd.*, N. R. E.) However, decisions in *State v. Taylor*, 72 Tex. 297, 12 S. W. 176 (1888), and *Big Lake Oil Co. v. Reagan County*, discussed below, indicate that a lease of state property is taxable to the lessee under Art. 7173, valued as under 7174. The case of *City of Abilene v. State*, *supra*, contains language directly in conflict with the holding in the *Daugherty* case. The Court in this case reasoned that Art. XI, Sec. 9, exempted only property used exclusively for public purposes, and property not so used, *e. g.*, property subject to a lease for a non-public purpose, is not exempted by Art. XI, Sec. 9, but by Art. 7150, Sec. 4, Tex. Rev. Civ. Stat. 1925, enacted pursuant to Art. VIII, Sec. 2, Tex. Const. Under this state of facts, state owned property, when leased, would be subject to taxation under Articles 7173 and 7174, Tex. Rev. Civ. Stat. 1925. This latter position is assumed both by the Appellant and by the Federal Government in its *amicus curiae* brief. Obviously, it is the more logical position, for when an interest in land is severed from the public domain and put in private hands, it should go there with the ordinary incidents of private property and subject to such taxation as may be provided by the State. See *Trimble v. City of Seattle*, *supra*. It is submitted that the foregoing authorities have, for all practical purposes, vitiated the holding in the *Daugherty* case, and that, should the question ever be again put squarely before a Texas court for decision, the court would

have no alternative but to declare the case overruled. (The fact that this question has not been directly in issue since the *Daugherty* case bears mute testimony to the lack of leasing activities on the part of the State, a point which will be emphasized later in this brief.) It is the contention of the State of Texas that regardless of the vitality, *et. passim*, of the *Daugherty* case, as regards lessors of Federal property the differentiation in tax treatment that results is a legitimate and reasonable exercise of the State's power of classification for tax purposes.

The case of *Big Lake Oil Co. v. Reagan County*, 217 S. W. 2d 171 (Tex. Civ. App. 1948, *error ref'd.*), is seemingly in direct conflict with the *Daugherty* case, and creates an apparent exception to taxation of a leasehold interest in State property under Arts. 7173 and 7174. This case held that the interest of a private individual acquired in an oil and gas lease of state university school land was fully taxable to such individual at the full value of such interest. The court held that Arts. 7173 and 7174 had no application, since the oil and gas leases, authorized under the Leasing Act of 1917, was, in effect, a grant, and the property interest acquired thereunder was a separate legal estate taxable to the owner thereof. The estate held by the lessee was characterized as a determinable fee title to the oil and gas underlying the lands covered by the lease. The court stated that Art. 7173 is to be construed not in the light when the construction is given, but in the light of the meaning attached thereto at the time of its passage; since the leasing act authorizing the oil and gas

leases of state owned land was not in existence at the time of passage of Art. 7173, the Court deemed the Article inapplicable to the estate created by such leases.

In summary of the preceding discussion, it can be seen that:

1. State owned property not expressly made subject to taxation may be leased without destroying the exemption accorded thereto if (1) the public purpose of the property has not been abandoned, and (2) all revenue from the renting or leasing inures exclusively to the public benefit.

2. A leasehold interest in State owned property will be taxed under Arts. 7173 and 7174, Tex. Rev. Civ. Stat. 1925.

3. The Big Lake case creates an exception to the applicability of Arts. 7173 and 7174.—

The question that must be determined is whether taxation of Federal lessees under Art. 5218, Tex.

At page 29 of its brief, Appellant, in arguing that there is no reasonable basis for distinguishing lessees of State and Federal property, states:

"To cite the most outstanding example of such properties, as is generally known, the extremely rich and prolific oil and gas lands of Texas and its subdivisions are periodically leased for millions of dollars to private corporations."

The appellant would imply from this statement that such properties are untaxed in the hands of such corporations. The *Big Lake* case clearly illustrates that this is patently incorrect; the full value of the mineral interest gained pursuant to such oil and gas leases is taxed.

Rev.Civ.Stat. 1925, constitutes unconstitutional discrimination in favor of the restricted class of state owned property that may be leased without being taxed at its full fee value.

**A. The State's Power of Classification For Purposes of Taxation is Extremely Broad.**

Restrictions imposed by the Federal Constitution upon a state's power of taxation have been said to be "extremely limited." *Wisconsin v. J. C. Penney Company*, 311 U. S. 435 (1940) at page 445. It is recognized that absolute equality in taxation is impossible of attainment. *Atchison T. & S. F. Ry. Co. v. Collins, et al.*, 294 F. 742, 745 (U. S. D. C., N. D. Cal., circa 1923), dismissed 267 U. S. 609. Hence, it is well settled that a state legislature has a wide range of choice in classifying and limiting the subjects of taxation. *Henneford, et al. v. Silas Mason*, 300 U. S. 577 (1937), and cases there cited; see also *Keeney v. Comptroller of the State of New York*, 222 U. S. 525 (1912); *Rivera v. Buscaglia*, 146 F. 2d 461 (C.C.A., 1st Cir. 1944). In exercising such choice, it may make classifications of property for the purpose of ad valorem taxation. *Allied Stores v. Bowers*—U. S.—79 S. Ct. 437 (1959); *Brown County, Texas v. Atlantic Pine Line Company*, 91 F. 2d 394 (C. C. A., 5th Cir., 1937); and see *San Jacinto National Bank v. Sheppard*, 125 S.W. 2d 715 (Tex. Civ. App. 1938); and 84 Corpus Juris Secundum, § 36-b, p. 122.

In erecting classes for the purpose of taxation, the States are subject to the equal protection clause of the Fourteenth Amendment.

"... But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The state may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. [Citing numerous cases] *Allied Stores of Ohio, Inc. v. Bowers*—U. S.—79 S.Ct. 437, 440-441, (1959).

(To the same effect see *Ohio Oil Co. v. Conway*, 281 U.S. 146 (1930); *Wisconsin v. J. C. Penney*, *supra*; and see *Atchison T. & S.F. Ry. Co. v. Collins, et al.*, *supra*, and the *Michigan Railroad Tax* cases, 138 F. 223 (Cir. Ct. W.D. Mich. S.D. 1905). There can be no arbitrary and unreasonable discrimination in taxation, but where there is a difference, it need not be great or conspicuous to warrant classification. *Kennedy v. Comptroller of State of New York*, *supra*. A classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause if any state of facts reasonably can

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The equal protection clause and the provisions of a State Constitution requiring equality and uniformity of taxation impose identical restrictions upon the State. *National Tea Co. v. State*, 286 N. W. 360 (Minn. Sup. Ct. 1939); and see *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181 (1933); and *Brown County, Texas v. Atlantic Pipe Line Company*, 91 F.2d 391 (C.C.A., 5th Cir. 1937).

be conceived that will sustain it. *Allied Stores of Ohio v. Reuters*, *supra*, and cases there cited. In the last named case this Court pointed out that the special motives or reasons of a legislature in making a classification need not be known to the Court; the Court then detailed facts that it considered sufficient to justify the classification and assumed the existence of those facts. (See 79 S.Ct. 442). In this connection, see also *Bekins Van Lines v. Riley*, 280 U.S. 80 (1929), in which the court assumed the existence of facts sustaining the classification involved; and see *Henneford v. Silas Mason*, *supra*.

The role of the court in cases of this nature is best characterized by the following quotations:

“Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize.” *Wisconsin v. J. C. Penney Co.*, *supra*, at page 445.

“Hence the familiar rule that, even in jurisdictions where equality is expressly required, the courts will not interfere to grant relief, except in a case where the inequality is the result of a misapplication of the law, or of a wilfull discrimination, or of such gross carelessness as to imply fraud.” *Atchison, T. & S. F. Ry Co. v. Collins, et al.*, *supra*, at page 745.



As pointed out by the Court in *Ricera v. Buseaglia*, *supra*, the cases are few and far between in which a state taxing statute has been ruled unconstitutional on the basis of invalid classification.

To guide the determination of whether the Equal Protection Clause has been contravened by state legislation, this Court has formulated the following general restrictions on the power of classification:

- (1) There must be a rational basis for the classification.
- (2) The segregation of the class cannot be palpably arbitrary, i. e.,
- (3) the classification in question must rest upon some ground of difference having a fair and substantial relation to the object of the legislation or to the public policy of the state.
- (4) All persons similarly circumstanced must be treated alike.

See: *Ohio Oil v. Conway*, *supra*; *Bekins Van Lines, Inc., et al. v. Reiley*, *supra*; *Atchison, T. & S. F. Ry. Co. v. Collins*, *supra*; and *Watson v. State Comptroller of the State of New York*, 254 U. S. 122 (1920).

The foregoing limitations are to be given a very broad construction, a fact evidenced by the preceding discussion. The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

*Madden v. Kentucky*, 309 U. S. 83, 88 (1940); *Rivera v. Bascaglia*, *supra*, "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden v. Kentucky*, *op. cit.* Further, in resolving the question of whether a state taxing law contravenes rights secured by the Federal Constitution, the Court may not depend upon form; construction or definition, but its decision must be based on the practical operation and effect of the tax imposed. *Shaffer v. Carter*, 252 U. S. 37, 55 (1920). As stated in *Wisconsin v. J. C. Penney Co.*, *supra*, at page 443:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Henderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that 'in passing on its constitutionality, we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U. S. 276, 280." (Italics in original.)

The practical operation of the exaction imposed by Art. 5248, Tex. Rev. Civ. Stat. 1925, as regards differentiation in the tax treatment of lessees of Federal

property and lessees of state owned property, is laboriously detailed above. It must now be determined whether the "natural and reasonable effect" of the different tax treatment is such as to make the classification invidious and discriminatory.

**B. The Tax in Question is Not A Discriminatory Exaction From Lessees of Federal Property.**

There are essentially two vital questions that must be determined by this Court. The first concerns whether there is a rational basis for according different tax treatment to Federal lessees than is accorded to lessees of state owned property, or, to state the converse, whether the different tax treatment is palpably arbitrary or invidiously discriminatory. The guide posts for decision of this question are set forth above. To paraphrase the language in *Allied Stores of Ohio, Inc. v. Bowlers*, the classification made by virtue of the operation of Art. 5248 within the framework of the Texas property tax exemption structure must be sustained if any reasonable state of facts can be conceived justifying it; and if such facts can be conceived, they will be presumed and the classification upheld.

Assuming that the classification in question is reasonable, this Court must pass on a second question raised by the Appellant, i. e., whether the mere fact that lessees of Federal property are segregated and put into a separate class for the purpose of taxation warrants a finding of unconstitutional discrimination against the Federal Government or those with whom it deals. This question is singularly unique.

By way of preface to the ensuing discussion, the Court's attention is directed to the fact that the Appellant has wholly failed to set forth a specific instance in which state property is leased to private individuals and used for purposes of private gain or profit; in fact, Appellant has failed to show, other than by innuendo, that the State engages in any leasing activity whatsoever. Consequently, the claim of discrimination must fail because the burden of showing that the classification is a hostile and oppressive discrimination against Federal lessees has not been sustained. In actuality, state leasing activities are extremely limited. The bulk of leasing that is done is in the form of oil and gas leases on University land, and, as pointed out above, the interest there created is taxed at its full value to the lessee. Appellants inability to cite any other specific example wherein state property is leased is indicative of the lack of such leasing. The property that is leased is generally let for the purpose of being operated as a public park, fair ground, airport, or for similar purposes. But even assuming that the state's leasing operations are as varied and broad in scope as Appellant would have them appear, the following discussion reflects that there is ample basis for differentiation in tax treatment of Federal and state lessees.

**1. The Classification Is Reasonable.**

The theory of intergovernmental immunity from taxation is of ancient origin. See *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819). The fear has been entertained that if one government were to

tax the property of another, conflicts between authorities would frequently ensue. A temptation would exist for one government to overtax the property of the other, and thus to shift upon the shoulders of the taxpayers of that government the burdens properly belonging to its own taxpayers. Taxation by one government of the property of another means, in the final analysis, taxation of taxpayers by an authority not responsible to them. It is, therefore, open to grave abuse. By overtaxing the property of another government, the taxing authority may seriously interfere with the capacity of that government to perform its duties.

These considerations do not persist when one government creates, by lease or contract, property interests in the hands of private individuals. In such a case, the private interests should be made to bear the burden of taxation by the other government in common with all other property interests held by individuals subject to and deriving benefits from the second government.<sup>31</sup>

The exemption by a taxing authority of its own property from its own property tax is also of ancient

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In this connection, it has been held that the controlling question in determining the validity of a revenue imposition is whether the state has given anything for which it may ask return. *Northwestern States Portland Cement Co. v. State of Minnesota*, ——— U. S. ———, 79 S. Ct. 357 (1959); *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940). In the latter case, Justice Frankfurter quotes Chief Justice Holmes as saying a state has given that for which it may ask return "insofar as government is the prerequisite for the fruits of civilization, for which we pay taxes."

ent origin, but is grounded upon completely different principles. From the earliest of times, taxing authorities have recognized that it would serve no useful purpose for them to tax their own property, since by doing so they would not be obtaining any revenue. It is obvious that, in taxing its own properties, an authority would merely be transferring its own money from its general fund to its tax account and from its tax account back again to its general fund. The net result of the transaction would be nil. The burdens on private citizens would neither be increased nor decreased thereby, yet the amount of bookkeeping involved in the transaction would be considerable, and the accounts of the authority would only be confused. It has, therefore, been recognized from the very outset that, in the interest of administrative simplicity, the taxing jurisdiction should exempt its own property from its own tax.

These considerations do persist and are of prime importance in determining whether state property, when leased, should be subjected to taxation in common with all other property in the state. The answer to this question appears conclusively to be in the negative. To subject such property to taxation puts the state in the position of competing with private lessors denuded of favorable economic inducement. Should the leasing of state property be thereby impeded, and the property forced to lie idle and unleased for any period of time, it is obvious that the state's revenue would be directly affected, for, indeed, rent is just as much "revenue" as are taxes. This is a public policy consideration.



of paramount importance, and is, in and of itself, sufficient to justify the classification made in the instant case.

**2. The Different Tax Treatment is Compelled and Supported by Consideration of the Fiscal Policy of the State of Texas.**

A second consideration is also of compelling importance in sustaining the differentiation in tax treatment. The State of Texas is able to compensate

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As pointed out in footnote 26 above, there are several taxing jurisdictions in the State of Texas. It would appear, therefore, that the argument concerning intergovernmental immunity would apply with equal vigor to considerations of one Texas taxing authority taxing the property of another Texas taxing authority. To a certain extent this is true, but it does not follow that private interests created by one Texas authority in its property should be taxed in common with all property within the territorial limits of a second Texas taxing authority. Each Texas taxing authority gets its taxing power from the State Constitution. The amount of property taxes that may be levied, and the uses to which such taxes may be put, are definitely prescribed by the Constitution and by statute. Such purposes are, naturally enough, public purposes, i.e., the revenues must inure to the public benefit. Since, as is pointed out in the discussion at pages 14-15, above, all revenue from the renting of state owned property must inure to the public benefit, or the exemption thereof is lost, it cannot be said that the argument that public policy dictates a favorable inducement to renting of state property is weakened by the fact that such property lies within two or more Texas taxing authorities. The revenue from the leasing must benefit the public interests of all state taxing authorities within which the property is located. Therefore, leasing of such property is a public interest to be fostered by the State, unaffected by the consideration that the property may belong to one state taxing authority and lie within the jurisdiction of another such authority.

any diminution in revenue occasioned by failure to tax property leased to private individuals through adjustment of the lease price. Naturally, this is a factor over which the State has no control when property belonging to the Federal Government is leased. (In reference to this factor, it might be asked: Where, then, is the inducement to leasing considered vital when the lease price approximates the current market value of such lease plus the proportionate burden of taxation that should be borne by the property? The answer to this question is apparent. The plaguing nuisance of annual rendition, assessment, equalization and payment imposed on private property holders in Texas is such that the absence thereof forms a ready inducement to lease.)

What could be the practical use of subjecting state property to the annual process of assessment and collection when the same result, as far as revenue is concerned, is achieved by contract? Obviously the latter procedure comports with administrative simplicity and eliminates cost of assessment and collection, considerations firmly entrenched in the fiscal policy of the State of Texas. Freedom of a state to formulate and pursue its fiscal policy has

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This is also a factor over which the State has no control when exempt property of private entities is leased. Therefore, it appears that prohibited discrimination might well result if property of such entities was allowed to be leased without being taxed; consequently, it is here again emphasized that property of exempt private entities, when leased for a purpose not carrying the exemption, is taxed at its fee value to its owner. (See discussion at page 16. above.)

been zealously guarded by this Court. As stated in *Wisconsin v. J. C. Penney, supra*, at page 444:

"For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. *A state is free to pursue its own fiscal policies, unembarrassed by the Constitution*, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection it has afforded, to benefits it has conferred by the fact of being an orderly, civilized society."

and as stated by Justice Cardoza in *Henneford, et al. v. Silas Mason, supra*, at page 588:

"True, collections might be larger if the use [that is taxed] were not dependent upon a prior purchase by the user. On the other hand, economy in administration or a fairer distribution of social benefits and burdens may have been promoted when the lines were drawn as they were. *Such questions of fiscal policy will not be answered by a court.* The legislature might make the tax base as broad or as narrow as it pleased."

It is apparent that the differentiation in the instant case is firmly grounded in Texas fiscal policy, and is supported by practical aspects of revenue-raising. Further, when it is considered that the State can (and, consequently, is presumed to) equate the financial burden on state owned leased proper-

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Unless otherwise indicated, all emphasis in this brief is supplied.

ty with taxed property through setting of the lease price, it can be seen that any possible discrimination attendant upon the different tax treatment of Federal and state lessees is completely mollified.

**3. The Classification Facilitates The Object of the Amendment to Article 5248, Tex.Rev.Civ.Stat. 1925.**

Not only is the classification in the instant case grounded in the public policy of the State of Texas, but the purpose of the enactment of the 1950 amendment to Art. 5248, Tex.Rev.Civ.Stat. 1925, is served thereby. As correctly pointed out in the Appellant's Brief, page 28, the purpose of the amendment was to raise revenue. It was enacted at the first session of the Texas Legislature to convene after the passage of Public Law 364 (The Military

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At page 30 of its brief, Appellant briefly propounds the proposition that since Texas is comprised of several taxing jurisdictions, a taxing authority not owning the property is not compensated for loss of taxes by the offset in the lease price. In setting the lease price the State does not figure exactly the market value of the lease, and then add the amount of taxes to which the property would otherwise be subject during the term of the lease. It is not contended that the State obtains anything other than the market value of the lease; but certainly the market value of a state lease is higher by reason of the absence of taxation, and the nuisance of rendition and payment. Of course it will not be an exact mathematical equation, but the loss of all taxes to which the property would otherwise be subject is compensated through fixing of the lease price. This conclusion is not affected by the fact that the leased property is owned by one Texas taxing authority and located within the jurisdiction of another, for the market value is directly affected by the absence of taxes of both authorities; and as pointed out in footnote 32, above, the rental inures to the public benefit of all taxing authorities within which the property is situated.

Leasing Act), and was obviously enacted in response thereto. The decisions of the courts below have established that in the absence of the amendment, the State could not have taxed the interests involved in the instant case.

As pointed out by the case of *Texas Company v. Cohn*, 8 Wash. 2d 360, 112 P. 2d 522, (1941), a state may constitutionally tax one class and exempt other classes if the classification tends in some lawful way to facilitate the raising of revenue. It is submitted that the preceding discussion amply illustrates that the classification in question is lawful, and that it facilitates the raising of revenue.

**C. The Fact That Federal Lessees Are Segregated As A Separate Class Does Not, in And of Itself, Make The Classification Invidious or Palpably Discriminatory.**

**I. There Is No Reason Why Lessees of Federal Property Should Not Be Segregated As A Separate Class.**

Assuming the classification in question to have a rational basis (a fact believed amply supported by the preceding discussion) there appears to be no reason whatsoever why Federal lessees cannot be put into a separate classification for the purpose of taxation. As pointed out above, the Fourteenth Amendment requires equal treatment only of all those similarly circumstanced. It does not require (in this case) that all lessees of property exempt from taxation be treated alike, as Appellant contends. Appellant's argument is analogous to the argument put forth in *Watson v. State Comptroller*,

*supra*. The tax there involved was an additional transfer tax upon investments of a decedent which had escaped taxation during his lifetime. It was contended that the tax was discriminatory because devisees of the same relationship receiving the same type of property were not taxed. The court held the tax to be valid, stating:

“The executors admit, as they must, that a classification is reasonable if made with respect to the kind of property transferred; or, to the amount or value of property transferred; or, to the relationship of the transferees; or, to the character of the transferee, for instance as engaged in charity. . . . [citing cases] But their list does not exhaust the possibilities of legal classification. . . . [citing cases] Any classification is permissible which has a reasonable relation to some permitted end of governmental action. *It is not necessary, as the plaintiff in error seems to contend, that the basis of the classification must be deducible from the nature of the things classified,—here the right to receive property by devolution.* It is enough, for instance, if the classification is reasonably founded in ‘the purposes and policy of taxation’ . . . . [citing cases] And what classification could be more reasonable than to distinguish, in imposing an inheritance or transfer tax, between property which had during the decedent’s life borne its fair share of the tax burden and that which had not?”

The Appellant does not contend, as indeed it could not, that it is an agent or instrumentality of the United States Government. The Government has not seen fit to protect Appellant from taxation of



the leasehold interest, which, as pointed out in *James v. Dravo*, is its prerogative. Instead, the interest created by virtue of the lease has been expressly made subject to taxation. Under this state of facts, it cannot be held that a rationally based class must be defeated simply because it contains only lessees of Federal property. To the contrary, as pointed out by the Federal government in its brief (p. 26) in the case of *James v. Dravo*, 302 U. S. 134 (1937):

“... There is nothing in the philosophy of our dual system that requires the state to accord a preferred status to the Federal Government or those who deal with it.”

**2. Taxation of the Lease Interest Does Not Interfere With the Functions of the Federal Government.**

It is now axiomatic that the fact that the burden of state taxation may incidentally affect or be passed on to the Federal Government does not vitiate the tax. *James, State Tax Commissioner v. Dravo Contracting Co.*, 302 U.S. 134 (1937); *Mason Co. v. Tax Commission of Washington*, 302 U.S. 186 (1937); *Alabama v. King and Boozer*, 314 U.S. 1 (1941); *Esso Standard Oil Co. v. Evans, Commissioner of Finance and Taxation, et al.*, 345 U.S. 495 (1953). As has been repeatedly emphasized, the Federal Government has expressly consented

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In line with this proposition, the Justice Department issued a memorandum on June 24, 1938, titled “Taxation of Government Bondholders and Employees,” in which it urged the abandonment of all immunity for private persons dealing with the States or the Nation.

to taxation of Appellant's leasehold interest; this Court has approved taxation of comparable interests where the taxes were measured by the value of the property belonging to the Federal Government. *U.S.A. & Borg-Warner Corporation v. City of Detroit*, 355 U. S. 466 (1958); *United States v. Township of Muskegon*, 355 U. S. 484 (1958); *City of Detroit v. Murray Corporation of America*, 355 U. S. 489 (1958); *Offutt Housing Co. v. Sarpy*, 351 U. S. 253 (1956); *Fort Dix Apartments Corporation v. Borough of Wrightstown*, 225 F. 2d 473 (C. C. A., 3d Cir. 1955) cert. den 351 U.S. 962. Consequently, the proposition that the taxes in question do not constitute a burden upon or interference with the performance of the functions of the Federal Government is deemed so clear and well established as to need no further elaboration. How this conclusion could be altered or changed merely by virtue of the lessees of Federal property being placed in a separate class escapes comprehension.

### 3. The Case of *Miller v. Milwaukee* Is Not On Point.

Appellant contends that since Chapter 37 of the 1950 Texas Session Laws has as its obvious aim the taxation of Federal lessees, it is special legislation and is discriminatory against such lessees, and for that reason, without more, it is unconstitutional. In

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These three cases arose in the State of Michigan and were decided by this Court during the October 1957 term; at various places in this brief these cases are referred to collectively as the Michigan cases, or singularly as the *Borg-Warner* case, the *Continental* case, or the *Murray* case.

support of this proposition, Appellant cites *Miller v. Milwaukee*, 272 U. S. 713. (Appellant's Brief, pp. 8, 12-14).

In *Miller v. Milwaukee*, a statute imposing a tax upon those dividends paid by a corporation to its stockholders out of income not taxable to the corporation was held unconstitutional. The court, finding that the Federal bonds were the most conspicuous instance of tax exempt corporate income, held that the tax constituted an unconstitutional discrimination against such income. The following quotation embodies the reasoning of the court:

" . . . It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. . . . We think it would be going too far to say that they [the acts of Congress giving immunity to national bonds] allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare

rather than the artifices contrived for private convenience and must look at the facts."

The foregoing illustrates that, in the final analysis, the crux of the decision was that the statute involved constituted a subterfuge or artifice designed to tax indirectly what the state was prohibited from taxing directly. It was only in this respect that discrimination was found."

The distinction between this case, and the instant situation is readily apparent. The State of Texas is taxing only that which it has been given permission to tax, and within limits that have been expressly approved. It cannot be said that such taxation is discriminatory or prohibited as imposing a direct effect upon an incident immune from taxation, and the *Miller* case cannot be cited for such a distorted proposition of law."

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"This proposition is clearly illustrated by the more logical concurring opinion of Justice Brandeis, who concurred on the ground that since the United States Congress expressly exempted interest on U. S. bonds from taxation by any state, and a dividend paid directly from such interest is purely within the exemption expressly conferred, the tax in question was void as being violative of that exemption. Justice Brandeis stated:

"I do not think it can be properly said that the state statute discriminates against Government bonds. . .

The operation and effect of the statute would be precisely the same if the dividend had been paid out of any other corporate income exempt from the state tax. . . ."

"The *Miller* case was distinguished by *Pacific Company v. Johnson*, 285 U. S. 480, at page 491. In addition, it has been cited by twelve other cases, but in the dissenting opinion in six of those cases. The most recent instance in which it was cited in a dissenting opinion was in the *Borg-Warner* case, by Mr. Justice Whitaker.

**D. In The Michigan Cases, This Court Approved Classification Similar to The Classification Involved In The Instant Case.**

Appellant argues that the Michigan cases do not support the conclusion of the Texas Supreme Court in the instant case, stating that such cases are distinguished from the instant case in that the law there involved, i.e., Public Law 189 of Michigan, affected equally all lessees of tax exempt property. (Appellant's Brief, pp. 15-16). In actuality, the differentiation in tax treatment under Public Law 189 is very similar to the differentiation in the instant case. Section 1 of said Public Law 189 (1953) of the State of Michigan, compiled in 6 Mich. Stat. Ann. 1950 (1957 Cum. Supp.), Section 7.7 (5) and (6), reads in pertinent part as follows:

"Section 1: When any real property which for any reason is exempt from taxation is leased, loaned or otherwise made available to and used by a private individual, association or corporation in connection with a business conducted for profit, except where the use is by way of a concession in or relevant to a public airport, park, market, fair ground or similar property which is available to the use of the general public [sic] shall be subject to taxation in the same amount and to the same extent as though the lessee or user were the owner of such property; provided, however, that the foregoing shall not apply to Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed or

property of any state-supported educational institution."

Three specific types of property are taken out of the operation of Public Law 189:

(1) Tax exempt property owned by either a private exempt individual organization or by the state or Federal government where the use made by the lessee is by way of a concession in or relevant to the use of a public airport, park, market, fair ground or similar property which is available for use of the general public.

(2) Federal property for which payments are made in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed.

(3) Property of any state-supported educational institution.

This Court discussed the government's contention that the exemption of the property covered in (2) above rendered Public Law 189 discriminatory. At footnote 6 on page 174 of the decision in *Boatmen's Trust Co. v. United States*, this Court stated:

"The government points to the fact that Public Law 189 creates an exception to the tax on users where payments are made by the United States 'in lieu of taxes in amounts equivalent to taxes which might otherwise be lawfully assessed' as manifesting a purpose to tax government property. But this exemption, which if anything operates in the government's favor, avoids the



possibility of a double contribution to the revenues of the state where private parties use Federal property for their own commercial purposes. Moreover, it is not at all inconceivable that the government might, in one way or another, pass the economic burden of such in-lieu payments to the taxpayers using its property even though he was also compelled to pay the tax imposed by Public Law 189."

This reasoning is peculiarly appropos to the situation at hand. As is pointed out above, the exemption of lessees of state owned property from taxes upon such property avoids a double contribution to the State's revenues, since the State compensates for its loss of revenue by affixing the lease price, thereby passing on to the lessee an economic burden which equates with the lost taxation.

Though the Court emphasized that persons using Federal property are treated no differently from those using property belonging to the state, its political subdivisions, charitable organizations, churches, etc., this language must be viewed in light of the practical operation of Public Law 189. The exception of the other two classes of property named above from the operation of Public Law 189 is not discussed, but the decisions must be considered a tacit approval of such exceptions. When it is considered that under the Texas taxing pattern only the lessees of a restricted type of state owned property are excepted from taxation, it can be seen that the classification created by Public Law 189 is as restricted, and the exemptions from taxation thereunder are as broad, as in the

case at hand. It is submitted that the approval of the exception of property belonging to state-supported educational institutions is direct support for the affirmance of the decision of the court below; and that the approval of the exception of property leased where the use is by way of a concession in or relevant to the use of a public airport, park, market, fair ground, or similar property available to the use of the general public, furnishes support by analogy for excepting from operation of the Texas ad valorem tax property the revenue from which is devoted directly to the public use and benefit of the State of Texas.

### **Summary of Argument Under Point I:**

There is no possibility of discriminatory tax treatment as between lessees of Federal property and lessees of privately held property-exempt from Texas ad valorem taxation. When property of the latter class is leased for a non-exempt purpose, the exemption is lost. The property is then taxed at its entire fee value to its owner; who bears the burden of the taxes as between lessor and lessee is a question controlled by private contract, and is not a matter of public concern.

There is differentiation in the tax treatment of lessees of Federal property and lessees of a restricted class of state-owned property. But in order for state-owned property to remain exempt though leased, (1) the public purpose of the property must not be abandoned, and (2) the revenue from the renting or leasing must be devoted to public purposes. Therefore, it

can be seen that the Texas exemption structure assures that state owned property will at all times be devoted to the public benefit; there is no such assurance as regards Federal property. Consequently, the differentiation in tax treatment is firmly grounded in Texas public policy.

The State of Texas earnestly submits that:

(1) There is a rational basis for the classification in question. It acts as an inducement to leasing of state owned property, a matter of public concern; it makes for administrative simplicity and facilitation of fiscal policy. It also serves to place lessees of Federal property and lessees of state-owned property on substantially the same footing so far as contributions to revenue are concerned. Indeed, lessees of Federal property would be "noticeably favored over their brethern" as stated by the Superior Court of Michigan in the *Continental* case were it not for this equalization.

(2) The differentiation in tax treatment is not invidious or discriminatory. It does not impede or burden the United States in the performance of its functions. Differentiation of tax treatment of comparable scope was tacitly approved in the Michigan cases.

(3) The different tax treatment of lessees of state and Federal property comports with Texas public policy by facilitating fiscal considerations and administrative simplicity.

✓ (4) The differentiation in tax treatment furthers the purpose of the amendment to Article 5248 by facilitating the raising of revenue.

In this case, there is no question but that the Appellant's interest is taxable. It would be extremely unjust to allow the Appellant to escape its proportionate share of the tax burden merely by reason of the slight difference in tax treatment between Federal and state lessees.

## II

### **THE TAX IMPOSED BY ART. 5248, TEX. REV. CIV. STAT. 1925, DOES NOT CONSTITUTE AN AD VALOREM TAX UPON FEDERAL PROPERTY.**

#### **A. There is No Impediment, Either in The Federal Constitution or Statutes, to The Enforcement of The Tax.**

It is well settled that in the absence of express Federal consent, the property of the United States is exempt from State taxation. *McCulloch v. The State of Maryland, et al.*, 4 Wheat. 316, 4 L. Ed. 579 (1819); *Van Brocklin v. Anderson*, 117 U.S. 151 (1886); *City of Springfield v. U.S.*, 99 F. 2d 860 (C.C.A., 1st Cir., 1938) cert. den. 306 U.S. 650; *American Motors Corp., et al. v. City of Keosha*, 274 Wis. 315, 80 N.W. 2d 363 (1957), affirmed 356 U. S. 21. But the fact that the United States owns an interest in property, or is vested with legal title, does not prevent interests owned

by private individuals in such property from being taxed. See *Baltimore Shipbuilding Co. v. Baltimore*, 195 U. S. 375 (1904); *Northside Canal Co. v. State Board of Equalization*, 8 F. 2d 739 (U.S.D.C. Wyo. 1925), rev'd other grounds, *Northside Canal Co. v. State Board of Equalization of Wyoming*, 17 F. 2d 55, cert. den. 274 U.S. 741; *S.R.A. Inc. v. Minnesota*, 327 U.S. 558 (1946); *Consolidated Uranium Mines v. Moffit*, 257 F. 2d 396 (C.C.A., 10 Cir. 1958); and see *Mocler v. Gormley*, 44 Wash. 465, 87 P. 507, (1906). Any possible impediment to the enforcement of a tax such as the one in question against lessees of Government owned property was removed by Section 6 of the Act of August 5, 1947, c. 493, 61 Stat. 774, (10 U.S.C.A. 1270d), which reads as follows:

"Sec. 6. The lessee's interest, made or created pursuant to the provisions of this Act, shall be made subject to State or local taxation. Any lease of property authorized under the provisions of this Act shall contain a provision that if and to the extent that such property is made taxable by State and local governments by Act of Congress, in such event the terms of such lease shall be renegotiated."

Under authority of this act, which is generally known as "The Military Leasing Act," taxation imposed by various states upon the interests of lessees of Federal property has been expressly approved by this Court. *Offutt Housing Company v. Sarge*, *supra*; *Fort Dix Apartments Corporation v. Borough of Wrightstown*, *supra*; *U. S. A. and Borg-Warner Corporation v. City of Detroit*, *supra*; *United States*:

*v. Township of Muskegon, supra*; and *City of Detroit v. Murray Corporation of America, supra*.

The contract between the United States and the Appellant contemplates the imposition of taxes such as are involved in the instant case. Condition (Section) 29 of the lease contract between the Appellant and the United States Government states:

“That the Lessee shall pay to the proper authority, when and as the same become due and payable, all taxes, assessments, and similar charges which, at any time during the term of this lease, may be taxed, assessed, or imposed upon the Government or upon the Lessee with respect to or upon the Leased Property.” (see R. 76).

The Senate Committee report on the portion of the leasing act quoted above states in part as follows:

“Section 6 provides that the interest a lessee holds under this act shall be subject to State or local taxes. In the event of States, not presently having legislation permitting the taxing of such property, enacting such laws subsequent to the negotiation of a lease under this act, this section provides that the lease can be renegotiated.” Senate Report No. 626, July 19, 1947; 1947 U. S. Code, Cong. Serv. 1593.

It is clear that the Federal Government contemplated that direct property taxes would be levied upon the leasehold interests created under the Military Leasing Act, and that the scope of consent to taxation includes such taxes.



## **B. The Tax is Not Levied Upon Property Belonging to The United States.**

In determining whether a tax is actually laid on the United States or its property, this Court has consistently gone behind the face of the taxing statute to view its practical operation. See *U.S.A. & Borg-Warner Corporation v. City of Detroit*, 355 U.S. 466 (1958); *City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958). The tax involved in the instant case is an ad valorem tax levied upon and assessed against the leasehold interest of the Appellant and is collectible solely from the Appellant. This point was made clear in the original trial, and was stressed in the opinions of both the Court of Civil Appeals and the Supreme Court of Texas (R. 114, 133, 149, 152, 169, 181). The tax is upon Phillips' property interest, or right of use, in the property, and is Phillips' personal obligation. The United States is not liable for the tax, and cannot be made responsible for payment of the tax to the School District.

Denominating the tax "ad valorem" does not make it an exaction upon Federal property. See *Consolidated Uranium Mines v. Moffitt*, *supra*; *City of Detroit v. Murray Corporation of America*, *supra*. In the latter case the court stated:

"We see no essential difference in so far as constitutional tax immunity is concerned between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his private ends. . ."

In the *Consolidated* case, the court said:

"In respect to mining claims, it was the clear intent of the legislature to authorize a tax upon the possessory right to explore and develop mines under existing laws and regulations applicable thereto. These assessments against the mining claims were limited to the possessory right to explore and develop the premises for mining purposes. They were not against the title or fee of the United States in the land, either under the five-dollar per acre provision in the statute, or otherwise. And a tax—*whether denominating value, occupation, use, gross proceeds or otherwise*—imposed under state law upon the possessory right to explore and develop mines located on land belonging to the unappropriated public domain of the United States is not open to challenge upon the ground that it constitutes a tax against property belonging to the United States.

The foregoing quotations clearly illustrate that regardless of the name appended to a tax, its validity is to be determined from the practical operation and incidence of the exaction.

The contention that the tax in question is upon Federal property because measured by the value of such property is likewise untenable. As is reflected by the record (R-29) the Board of Equalization of the Dumas Independent School District received voluminous testimony in setting the value of the leasehold interest. The fact that such value as assessed coincided with or was the same as the fee value is no defect. (See the cases cited in the suc-

ceeding section.) It is not strange or unreasonable that Appellant should pay a tax based upon the value of the property. During each year for which it has been assessed and for which it may be assessed it has had and will have all of the rights of ownership without the other burdens thereof. Requiring Appellant to pay a tax based upon the value of the property is a practical, just, fair and equitable method of taxing the right of exclusive use of the property during each taxable year. As pointed out by the Texas Court of Civil Appeals, the Appellant certainly has a valuable right in the use of the Government property since it pays \$1,026,666.67 annually for the right to use such property. This court aptly stated in the *Borg-Warner* case, "... it seems obvious enough that use of exempt property is worth as much as use of comparable taxed property during the same interval . . ." 355 U.S., p. 470.

### **C. The Michigan Cases Furnish Direct Authority For Sustaining The Tax.**

In the Michigan cases, as in *Offutt Housing Co. v. Sarpy*, *supra*, and *Fort Die Apartments Corporation v. Borough of Wrightstown*, *supra*, taxes directly similar to the tax here in issue were upheld, even though measured by the fee value of the property. In the *Borg-Warner* case, the tax upheld was imposed under Michigan Public Law 189 on a lessee's right of use of Federally owned property, and was measured by the value of the demised premises. The *Continental* case involved substantially the same issues, except that the property was held under

permit and not under lease. Certainly, in these two cases the right of use was no greater, the duration of the permitted use no longer, and the taxes no heavier than in the case at hand; but, admittedly, this Court styled the taxes "use" taxes, which might serve to distinguish these cases from the instant case, though the line of difference would be thin and one of form and definition only. However, any void that is left by these cases in furnishing direct authority for the sustention of the tax in question is filled by the *Murray* case.

In the last named case the tax involved was not levied under Michigan Public Law 189, as was the taxes in the *Borg-Warner* and *Continental* cases, but was assessed pursuant to an ad valorem tax statute, and was measured by the full value of the property. In upholding the tax against the claim that it was upon Government property, this Court stated:

"It is true that the particular Michigan taxing statutes involved here do not expressly state that the person in possession is taxed 'for the privilege of using or possessing' personal property, but to strike down a tax on the possessor because of such verbal omissions would only prove a victory for empty formalisms and empty formalisms are too shadowy a basis for invalidating state tax laws. Cf. *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582. In the circumstances of this case the State could alleviate such grounds for invalidity by merely adding a few words to its statutes. Yet their operation and practical effect would be precisely the same."

Similarly, in the instant case, the practical effect of the tax would be precisely the same whether denominated an ad valorem, use, or other type of tax. And invalidating the tax because called "ad valorem" would indeed prove a victory for empty formalisms.

Appellant would distinguish the *Murray* case on the ground that the Michigan statute authorized imposition of the tax involved against the possessor of the property, a fact alluded to in the opinion of the Court. But it goes without saying that the decision was not rested upon this point, for certainly the fact that a tax is authorized to be assessed against the possessor of property does not allow the imposition of ad valorem taxes directly on property exempt to its owner. See *United States v. Allegheny County, Penn.*, 322 U. S. 174 (1944); *Miller v. Milwaukee*, *supra*. It is apparent that the crux of the decision is that the right of possession and use created in the lessee is a sufficient interest to sustain the imposition of a tax measured by the value of the property belonging to the Government; it does not matter whether that right of possession and use be denominated, or taxed, as a property interest, or as a "privilege" or "use."

Appellant also argues that the tax in question is upon Federal property because such property is subject to a lien. Liens for the enforcement of Texas ad valorem taxes are provided in Article 7172, Tex. Rev. Civ. Stat. 1925:

"All taxes upon real property shall be a lien upon such property until the same shall have been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title."

It is clear from a reading of this article that the lien created is against the property or interest taxed, in this case the Appellant's leasehold interest. It cannot be enforced so as to interfere with possession of the United States Government. See *United States v. Allegheny County, supra*; *S. R. A. v. Minnesota, supra*; *Consolidated Uranium Mines v. Moffitt, supra*. The fact that the lien attaches to the leasehold interest, and that such interest might conceivably be made the subject of a tax sale, does not render the tax invalid, since the title of the United States to the property would in nowise be thereby affected. This proposition was expressly decided in *S. R. A. v. Minnesota, supra*; and see *Consolidated Uranium Mines v. Moffett, supra*.

In furtherance of the attempted distinction of the *Murray* case, Appellant argues at pp. 39-40 of its brief that the tax imposed by Art. 5248, Tex. Rev. Civ. Stat. 1925, is "simply and forthrightly" laid on property of the Federal Government by virtue of the operative language of said Article.<sup>40</sup> This contention was

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<sup>40</sup>In this same vein, at page 49 of its brief, Appellant states that in order for the School District to validly impose the tax in question, the Texas Constitution must be amend-



disposed of by the decision of the Texas Supreme Court, wherein it was stated:

“We agree that it was the intention of the Legislature, in amending Article 5248 to make the value of the entire property belonging to the United States Government, if *used and occupied by private business and operated for profit*, taxable to such user and operator.” (R. 181; italics in original.)

In construing the Article thusly, the Court below, without expressly so stating, invokes two principles of statutory construction so well established as to need no citation of authorities, i. e., (1) that construction must be given a statute which is consistent with its constitutionality, and (2) the legislature will be presumed not to have done a vain thing. The Texas Legislature was most certainly aware that it could not tax Federal property, a fact evidenced by two separate statutory exemption provisions (Art. 5248, Art. 7150, Sec. 4. Tex.Rev.Civ.

ed, since the District is permitted only to lay ad valorem taxes. This argument reaches the insupportable result that ad valorem taxes cannot be levied on property interests created by lease or conveyance of less than the fee, but must be levied against the owner of the fee. The contrary of this proposition is so well settled as to need no discussion. See Art. 7173, Tex.Rev.Civ.Stat. 1925, and *Big Lake Oil Co. v. Reagan County*, discussed *supra*; and see *Jett v. Kahn*, 273 S.W.2d 431 (Tex.Civ.App. 1954, *error ref'd.*, N.R.E.); *Sheffield v. Hogg*, 124 Tex. 290, 77 S.W.2d 1021 (1934); *Tennant v. Dunn*, 130 Tex. 285, 110 S.W.2d 53 (1937); *Hydrocarbon Production Company v. Valley Acres Water District*, 204 F.2d 212 (C.C.A., 5th Cir. 1953), cert. den. 346 U.S. 825; *Downman v. The State of Texas*, 231 U.S. 353 (1913).

Stat. 1925); by enacting the amendment to Art. 5248 on the heels of the passage of the Military Leasing Act, the Texas Legislature left no question but that it was imposing a tax only upon the interests to which express consent for taxation had been given.

From the preceding discussion, it can be seen that the tax in issue is not a tax upon Federal property, and that there is virtually no distinction, factual or legal, between the case in question and the *Murray* case. The reasons set forth in the latter case compel the conclusion that the tax upon the Appellant must be upheld.

#### **D. The Allegheny Case is Not Controlling.**

In urging that the tax here in question is an ad valorem tax upon Federal property, Appellant relies entirely upon the case of *United States v. Allegheny County*, cited *supra*. In assuming this position, the Appellant rests upon a perch that has had many prior occupants. The Appellants in the Michigan cases, and in *Esso Standard Oil Co. v. Eans, Commissioner of Finance and Taxation, et al.*, 345 U. S. 495 (1953), relied upon the *Allegheny* case, with singular lack of success. The applicability of the case has been severely limited. The theory applied to the facts, as viewed by the Court, i. e., that the tax constituted a tax upon property of the Federal Government, is undoubtedly correct. But each of the above named cases have been distinguished on the facts, and the tax found not to be imposed on property belonging to the U. S. It is submitted that the pre-

ceding discussion evidences that the facts in this case are equally distinguishable, and come within the express reservation of the *Allegheny* case described at p. 50 of Appellant's Brief.

This Court in the *Murray* case strongly implies that the *Allegheny* case is out of step with the trend of decisions and has no meaningful vitality. Certainly, if the doctrine of this case were extended so as to prohibit the taxation of interests owned by private individuals simply because measured by the value of property belonging to the United States, it would be in direct conflict with the Michigan cases and the principle established in *Werner Machine Co., Inc. v. Director of Taxation, Department of the Treasury of New Jersey*, 350 U. S. 492 (1956), and *Society for Savings v. Coite*, 6 Wall. (U. S.) 594 (1867).

### **Summary of Argument Under Point II:**

The scope of consent to taxation embodied in the Act of August 5, 1947, c. 493, 61 Stat. 774 (10 U. S. C. A. 1270-1270d) includes taxes of the nature imposed by the Dumas Independent School District; the imposition of such taxes was in the contemplation of both the Appellant and the United States when the lease between them was executed. There is no question but that Appellant's interest in the property is taxable; to allow it to go untaxed would place the Appellant in an unjustified, favored position, and would result in the Appellants receiving the benefits of property ownership and government protection free from the burden of taxation ordinarily attendant thereon.

The tax in issue is not a tax upon Federal property. It is a tax upon the Appellant's leasehold interest, or right of use, in such property, and is his personal obligation. The United States is not liable for the tax and cannot be made responsible for its payment. Nor can the property belonging to the United States be made the subject of a lien. The fact that a lien attaches to the leasehold interest and that such interest might conceivably be made the subject of a tax sale does not render the tax invalid, since the title of the United States to the property would in no wise be thereby affected.

Denominating the tax "ad valorem" does not make it a tax upon the property of the Government; nor does the fact that it is measured by the value of the Federal property render it invalid. These propositions were firmly established by the *Murray* case, which, along with the other Michigan cases, furnishes direct support for sustaining the decision of the Court below.

The case in issue is distinguishable from the case of *United States v. Allegheny County*. The facts here involved are within the express reservation of the *Allegheny* case. The Dumas Independent School District has not attempted to impose a tax on Federal property, but has sought only to tax the lessee's interest, for which permission has been given by the United States Government.

### Conclusion

Art. 5248, Tex. Rev. Civ. Stat. 1925, as amended by Ch. 35, Tex. Sess. Laws, 1950, 51st Leg., 1st C. S.,

does not constitute a tax upon Federal property, and does not unconstitutionally discriminate against the United States Government or its lessees. The classification created by virtue of the operation of Art. 5248 within the Texas property tax exemption structure is reasonable, and is within the State's power to identify and classify subjects of taxation. The judgment of the Texas Supreme Court should be affirmed.

Respectfully submitted,

**WILL WILSON**

Attorney General of Texas

**W. V. GEPPERT**

Executive Assistant Attorney  
General

**JACK N. PRICE**

Assistant Attorney General  
Capitol Station  
Austin, Texas

October, 1958.

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**SUPREME COURT, U. S.**

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

No. 40

**PHILLIPS CHEMICAL COMPANY, A Corporation,**  
*Appellant,*

**v.**

**DUMAS INDEPENDENT SCHOOL DISTRICT**

On Appeal from the Supreme Court of the State of Texas

**REPLY BRIEF FOR APPELLANT**

**CLARK M. CLIFFORD**  
**CARSON M. GLASS**  
1523 L Street, N. W.  
Washington 5, D. C.

**RAYBURN L. FOSTER**  
**HARRY D. TUENSB**  
**C. J. ROBERTS**  
**THOMAS M. BLUM**  
**C. REX BOYD**  
Phillips Building  
Bartlesville, Oklahoma

*Attorneys for Appellant,*  
*Phillips Chemical Company*

November 14, 1959



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1959

No. 40

PHILLIPS CHEMICAL COMPANY, A Corporation,  
*Appellant,*

v.

DE MARS INDEPENDENT SCHOOL DISTRICT

On Appeal from the Supreme Court of the State of Texas

**REPLY BRIEF FOR APPELLANT**

I. It is admitted in the *amicus curiae* brief of the State of Texas (T. Br., pp. 18, 20)<sup>1</sup> and the brief of Appellee School District (D. Br., pp. 4, 13)<sup>2</sup> that the taxability of leasehold interests in exempt lands, other than Federal is still governed by the provisions of Articles 7173 and 7174, which are less burdensome than those of Chapter 37 applying to lessees or users of Federal property.

<sup>1</sup> For simplicity, the School District's brief will be referred to as "D. Br." and that of the State as "T. Br."

<sup>2</sup> See also Motion of Appellee to Dismiss, p. 9.

As shown in our main brief (at pp. 16-21), under the Texas taxing system lessees of Federal property are the only lessees of tax-exempt property who are required to pay taxes measured by its full fee value. *Daugherty v. Thompson*, 71 Tex. 192; *Trammell v. Faught*, 71 Tex. 557, and other decisions of the Texas Supreme Court have established that under Articles 7173 and 7174 a lessee of non-Federal tax exempt property is not required to pay any taxes if his lease is for less than three years. If his lease is for more than three years, the lessee is required to pay a tax measured solely by the value of his leasehold interest.

That Articles 7173 and 7174, as construed in *Daugherty v. Thompson* and *Trammell v. Faught*, are controlling law in Texas as to the taxing of leases of non-Federal exempt property is also manifest from the official opinions of the Attorney General of Texas.<sup>2</sup> Thus, in his Opinion No. WW-270, dated October 7, 1957 (App., pp. 24-26) which involved the taxability of the leasehold estate of W. T. Grant Company in property owned by the University of Texas, the State Attorney General quoted the text of Article 7173 and pointed out that this statute was construed in *Trammell v. Faught*, *supra*, as meaning:

"If appellant has held the land under an absolute lease for a term of three years or more, his leasehold estate would have been subject to tax."

At the same time that the School District urges that Chapter 37 must be viewed in the context of the entire Texas taxing system (D. Br., pp. 7-8, 51-52), it fails to abide by its own admission. Instead, it omits all discussion of the part played in the taxing system by Articles 7173 and 7174.

For the convenience of the Court, we have reproduced the relevant opinions of the State Attorney General in an appendix to this brief.

ation upon such value as if would bring at a fair voluntary sale for cash, but he would not be liable to taxes upon the value of the freehold estate in the lands." (App., p. 25)

The State Attorney General went on (*ibid.*):

"Our research does not reveal that this ruling of the Supreme Court has been departed from. Article 7174 V. C. S. provides how such leasehold shall be valued. This statute provides in part, as follows:

'Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash.'

"You are, therefore, respectfully advised that the leasehold estate of W. T. Grant Company in the real property in question is subject to ad valorem taxes and the value should be ascertained as provided in Article 7174, V. C. S."

The State Attorney General expressed the same views in his Opinion No. WW-284, dated October 17, 1957 (App., pp. 26-32), which concerned, *inter alia*, the taxability of a lease of property by the City of Lubbock to West Texas Compress and Warehouse Company.

Although, as shown in our main brief (pp. 20-21, App. A, pp. 4a-4b), even greater discrimination against Federal lessees would result if Articles 7173 and 7174 can be regarded as "no longer controlling", the forthright admission by the Attorney General of Texas that leasehold interests in non-Federal exempt property are in fact taxable under Articles 7173 and 7174 brings into clear focus the disparity in tax treatment accorded Federal and non-Federal lessees. The discrimination against Federal lessees is patent. In

view of this, the holding of the four dissenting justices of the Texas Supreme Court appears to furnish an appropriate basis for the decision of this Court.

2. The School District also urges that Federal lessees are not in fact subjected to higher taxes than lessees of other tax exempt property because non-Federal exempt property "normally loses its exemption from taxation when not owned and used exclusively for the exempt purpose." (D. Br., p. 4) "Even the property of state and local governments loses its exemption when it is not owned and held for public purposes." (D. Br., p. 15) These statements do not present an accurate picture as to the status of otherwise exempt property when leased for non-exempt use.

As to property owned by the State itself it is clear that such property cannot be subjected to state, county or local taxes in any shape, manner or form without statutory consent. This is inescapably so because the State cannot tax itself and its political subdivisions lack the organic power to do so. The creatures of the State cannot tax their creator.

The State's brief recognizes that property belonging to its *political subdivisions* may be leased for a non-exempt use without destroying its exemption (T. Br., p. 14). Texas law requires that the revenue from such a lease, not the property itself, be used for public purposes. Thus, under Texas law, exempt property leased for commercial purposes retains its exemption as long as the ultimate public purpose of the property is not abandoned, and the revenue from the lease inures to the public benefit (T. Br., pp. 14-15).



These principles, which have been established by the cases cited in our main brief (App. B, p. 5a), have been applied by the Attorney General of Texas in his official opinions. In an opinion dated December 9, 1958 (Opinion No. WW 531, App., pp. 17-23), subsequent to the decision of the Texas Supreme Court in the case at bar, the State Attorney General ruled that numerous buildings originally a part of PanTex Ordnance Plant, deeded by the Federal Government to Texas Technological College, and rented by the College to Phillips Chemical Company and others for private use, remained tax exempt to the College (App., p. 22):

"The exemption awarded to 'public property used for public purposes' is not lost even though such property may be temporarily leased or rented, so long as the public purpose of the property has not been abandoned, and so long as the revenue from such renting or leasing inures to the public benefit. *State v. City of Beaumont*, 161 S. W. 2d 344 (Tex. Civ. App. 1942, no writ history); *City of Abilene v. State*, 143 S. W. 2d 631 (Tex. Civ. App. 1938 Error Dismissed)."

Clearly, therefore, Texas law does not require exempt property of a political subdivision to be used only for a public purpose in order to retain its exemption. The exemption is retained even if the property itself is leased to a private person or corporation for a commercial purpose as long as the owner in

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To the same effect see also Opinion No. WW 281 dated October 17, 1957 (App., pp. 26-32).

As pointed out above, property owned by the State retains its exemption regardless of the character of its use or the purpose for which it is leased.





Parking garage and retail establishments in State office building (Article 678c)

Housing authority properties (Article 1269k)

Public grounds belonging to the State of Texas under the charge and control of the State Board of Control (Article 666a)

Any unsold land in the public domain (Article 5334)

Property used for pumping stations, loading racks, electric sub stations and tank farms (Article 6020a)

Property owned or controlled by any state agency where not otherwise prohibited (Article 2022zz 1, Section 5)

It is clear from these examples that the State of Texas and its myriad political subdivisions own and are authorized to lease extensive properties for private and commercial use which may greatly exceed in value the Federal property available for lease in Texas.

4. Seeking to divert this Court from the fact that Federal lessees are required to pay higher taxes than those assessed against lessees of other exempt property, the School District reiterates throughout its brief that the taxes upon Federal lessees should be compared only with the taxes paid directly or indirectly in the form of rent by lessees of non-exempt property.

The *Michigan* cases, however, make it clear that to avoid unconstitutional discrimination the taxes imposed upon Federal lessees must be no more onerous than those imposed upon lessees of *exempt* as well as

of non-exempt property." This is implicit in the reference in the Court's opinion in *Borg Warner* to the fact that "here the tax applies to every private person who uses exempt property in Michigan in connection with a business conducted for private gain." 355 U. S. at 473. It is explicit in the separate opinion of Mr. Justice Harlan, (355 U. S. at 507):

"\* \* \* The state taxes here \* \* \* do not operate in a discriminatory fashion by so measuring the tax on use or activities as to impose an unequal tax burden on lessees or users of government property *vis-a-vis* lessors, users or owners of other tax exempt or non-exempt property." (Italics supplied)

In this connection, both the School District (D. Br., p. 28) and the State (T. Br., pp. 40-41), pointing to the fact that the Michigan statute in *Borg Warner* excepted certain properties from its coverage (see 355 U. S. at 367, fn. 1), urge that this Court could not have intended to hold that Federal lessees may not be taxed more than lessees of other exempt property.

The scope of the exceptions in the Michigan statute is very limited, however, as compared to the vast properties which under Texas law retain their tax exemption when used for private purposes and profit.

Even as compared to lessees of non-exempt property, Phillips is placed in an unfavorable position by Chapter 37 because the annual rental which it agreed to pay assumed the non-taxability of the Federal Government's interest in Cactus Ordnance Works. R. 76. The Government retained the benefit of its tax exemption and did not pass it on to Phillips. See Hearings before Subcommittee No. 3 of the House Armed Services Committee, 80th Cong., 1st Sess., on H. R. 3471 at pp. 2353, 2354. Hearings before the Senate Armed Services Committee, 80th Cong., 1st Sess., on S. 1198, H. R. 3471 at pp. 27, 28-32.

Moreover, the Court in *Borg Warner* patently understood the exceptions to apply only to the property which actually was being used for public purposes. Only such an understanding can be reconciled with the Court's statement that the Michigan statute applied to "every person who uses exempt property *in connection with a business conducted for private gain.*" (355 U. S. at 473) (Italics supplied)

5. Both the School District (D. Br., pp. 27-33) and the State (T. Br., pp. 21-34) contend that the more onerous tax imposed upon Federal lessees is not unconstitutional because the States have power to classify reasonably the various objects of taxation and that the separate classification of Federal lessees here has a reasonable basis.

In our main brief (at pp. 22-27), we have shown that the classification power of the States is insufficient to support a statute imposing heavier taxes upon persons dealing with the Federal Government than those imposed upon persons dealing with the States. Moreover, neither of the justifications advanced by the State of Texas constitutes a reasonable basis for classifying Federal lessees separately.

The State suggests that the classification is appropriate because

"To subject (State) property to taxation puts the state in the position of competing with private lessors denuded of favorable economic inducement. Should the leasing of state property be thereby impeded, and the property forced to lie idle and unleased for any period of time, it is obvious that the state's revenue would be directly affected, for, indeed, rent is just as much 'revenue' as are taxes." (T. Br., p. 29)



But far from supporting the separate classification of Federal lessees, this asserted justification graphically illustrates the reason Federal lessees cannot be required to pay heavier taxes than lessees from the State. If the leasing of State property is impeded by the lack of favorable economic inducements, the effect of the decision below would plainly impede the leasing of Federal property even more since it places Federal lessees at a disadvantage compared to lessees from the State.

Equally without merit is the State's further justification that there is no "practical use of subjecting State property to the annual process of assessment and collection when the same result, as far as revenue is concerned, is achieved by contract." (T. Br., p. 31)

Apart from the fact that this argument is inconsistent with the State-advanced argument just discussed, this asserted justification is erroneous. What ever validity this rationalization might have if no taxes were imposed upon State lessees and therefore none need be assessed and collected, it is established that lessees of tax exempt property for absolute terms of three years or more must pay taxes upon the value of their leasehold interest. Although the tax assessed is measured solely by the value of the lessee's interest (Article 717b), the fact remains that taxes are assessed and collected from such lessees of exempt property. It is difficult to see how imposing more limited taxes upon lessees from the State than those imposed upon Federal lessees "comports with administrative simplicity and eliminates costs of assessment and collection \* \* \*." (T. Br., p. 31)

Finally, contrary to the State, the same result, *i.e.*, taxing State lessees at full fee value, is clearly not

achieved by contract when the matter is considered in the context of the actual situation prevailing in Texas. As noted in our main brief (at App. B, p. 76), the taxing authority in Texas is subdivided among the State and its numerous political subdivisions. Consequently, since the taxing authority is frequently a political subdivision separate and distinct from the landlord receiving the full rental, the taxing authority receives no offset in rental to compensate for the lower taxes paid by the lessees of such exempt property.<sup>11</sup>

6. Both the School District (D. Br., p. 2) and the State (T. Br., p. 1) suggest that Phillips misstated the facts when it stated that property owned by the Federal Government was placed upon the tax rolls in the name of Phillips Chemical Company. The accuracy of Phillips' statement is supported by the official acts of the School District as shown by the assessment sheets (R. 92, #, R. 109), tax rolls (R. 111-119), and tax statements (R. 161-162).

For example the assessment sheets read (R. 109-110):

Owner Phillips Chemical Company

All of the following described realty, commonly known as Cactus Ordnance Works, includ-

1. School District (D. Br., pp. 25-26) and the State (T. Br., p. 1) argue that, despite the various taxing authorities, it is not fair to tax the lessees of exempt property since all taxes and rental really ends up in the same place. If that were the case, there would be no reason for the various statutory provisions exempting certain properties owned by the State and its political subdivisions to taxation, or whole or in part, by the various taxing authorities. It would also make it difficult to understand why taxing authorities have not attempted to tax property owned or leased by other political subdivisions. See pages mentioned at App. B, p. 50.

ing buildings, improvements, fixtures, machinery, and appurtenances thereto belonging, and more particularly described as follows, to wit:

(Legal Description of Property Omitted)

"Total value of the above described realty, including buildings, improvements, fixtures, machinery and appurtenances thereto belonging.

7. Both the School District (*D. Br., c.g., p. 39*), and the State (*T. Br., c.g., p. 6*) recognize that the tax here involved is an ad valorem tax. Nevertheless they contend that the tax is not an unconstitutional ad valorem tax upon Federal property even though the amount of the tax is measured by the full fee value of the property.

They urge that the tax here is constitutionally valid under the authority of Section 6 of the Act of August 5, 1947 (*T. Br., p. 46; D. Br., pp. 49-50*). But that statute authorizes only the taxing by the States of "the lessees' interest." The only interest which Phillips has in the Cactus Ordnance Works and which could be subjected to taxation under an ad valorem tax system is its leasehold interest.

An ad valorem tax as distinguished from a use tax is assessed traditionally only upon interests in property as such. Since the tax here involved is in fact an ad valorem tax, the imposition of such a tax measured by the full fee value of the property in effect taxes the entire interest in the property. Inasmuch as Phillips owns only a leasehold interest in the property and the Federal Government owns the remainder, the tax here is upon the fee interest of the Federal Government as well as the interest of Phillips. Conse-

quently, this tax not only goes beyond the limited consent contained in the Act of August 5, 1917, but it is imposed upon Federal property without any Congressional consent.

The State (T. Br. p. 48) further argues that the tax, although *ad valorem* of property, is valid as a "tax upon Phillips' property interest, or right of use, in the property." . . . In the same vein, the School District (D. Br. p. 39) contends that "the right and privilege of use and occupancy is a property right, and may be subject to *ad valorem* taxation."

These arguments ignore the historical difference between use and *ad valorem* taxes. As far as we have been able to ascertain, *ad valorem* taxes have never been imposed upon the right or privilege to use property. To permit the taxing of the right to use property by way of *ad valorem* taxation would destroy the established distinction between these two very different kinds of taxes.

The School District (D. Br. pp. 42-43) argues that this Court in the Michigan cases has already destroyed the distinction between use and *ad valorem* taxes. It argues further, that if the distinction still survives, the Court should now hold that it is no longer valid. In our opinion, at pp. 46-49, we have shown that the Michigan cases have nothing to do with the distinction. While the surrounding circumstances in the Michigan cases left the way open for construing the taxes there involved as valid *ad valorem*, the limitations imposed by the Texas Constitution preclude the construction of these taxes as anything other than *ad valorem* taxes. The School District has advanced no reason for advocating the elimination of the distinction other than its desire to preserve Chapter 37 from

invalidation. Such desire is insufficient to justify the amalgamation of these two types of taxes.

### CONCLUSION

For these reasons and those set out in our main brief, it is respectfully submitted that Chapter 37 of the 1950 Texas Session Laws is unconstitutional and that the judgment of the Texas Supreme Court holding to the contrary should be reversed.

Respectfully submitted,

CLARK M. CHITFOLD

CARSON M. GLASS

1523 L Street, N. W.

Washington 5, D. C.

RAYBURN L. FOSTER

HARRY D. TURNER

C. J. ROBERTS

THOMAS M. BLOOM

C. REX BOYD

Phillips Building

Bartlesville, Oklahoma

*Attorneys for Appellant,*

*Phillips Chemical Company*

November 14, 1959

## APPENDIX

THE ATTORNEY GENERAL OF TEXAS  
 AUSTIN, TEXAS

Will Wilson  
 Attorney General

December 9, 1958

Opinion No. WW 531

Re: Whether certain property owned by Texas Technological College in Carson County is exempt from taxation under the laws of the State of Texas.

Mr. E. N. Jones, President  
 Texas Technological College  
 Lubbock, Texas

Dear Mr. Jones:

We quote from your opinion request as follows:

"Your opinion is respectfully requested as to whether certain property owned by Texas Technological College in Carson County is exempt from taxation under the laws of the State of Texas.

"The property was originally the PanTex Ordinance Plot and was deeded by the Federal Government to Texas Tech on April 1, 1949 by deed without warranty for the purpose of educational utilization. The deed contained a recapture clause in event of a national emergency.

"During the Korean emergency in 1951 and 1952, the Government exercised the recapture clause and recaptured approximately 10,000 acres of the 16,000, with improvements, originally deeded to the College. A period of negotiations began and culminated in the instruments dated August 19, 1955 which have been sent to your office.





It is contemplated that as the educational program expands, this property will be used in connection to the school and is being held for the purpose.

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This property is owned until 1975, Texas Tech, having been transferred from the United States Government for use of nonmilitary law enforcement. The majority of the property belongs to the Phillips-Chemical Company, } for storage purposes. Phillips rents three warehouses on a five year lease and rents one hundred and two (102) plots on a one year lease, paying only for the plots actually used. Certain staff residences located on this property are available for use on a month to month basis. Certain buildings, plots, land, roads, and land on the Phillips-Ambros are owned by Carson Chemical. The Phillips is the landholder and owner of the property. The Phillips has the right to use the land for any purpose.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

Article 2, Section 2 of the Texas Constitution contains the following language:

the legislative power to control laws, even if such taxation is not properly used for public purposes.

poors, and all buildings used exclusively and owned by persons or associations of persons for school purposes.

The provisions of the aforesaid Article are permissive and not mandatory. Pursuant thereto, the legislature enacted Article 7469, Texas Revised Civil Statutes, the salient provisions of which read as follows:

"The following property shall be exempt from taxation, to-wit:

"1. Schools and churches; Public school houses;

"2. All public colleges, public academics, and all endowment funds of institutions of learning and religion not used with a view to profit, and when the same are invested in bonds or mortgages, and all such buildings used exclusively and owned by persons or associations of persons for school purposes;

"3. All property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof."

#### GENERAL PRINCIPLES.

The exemption of property used for school purposes extends to private schools as well as public schools. *Cass v. State*, 10 Tex. 664 (Tex. 673, 1823). However, the exemption accorded private schools is more restrictive than the exemption given to public school houses, public colleges and public academics. Chief Justice Stayton pointed out this distinction in the case of *St. Francis College v. Harris*, 140 Tex. 512 (Tex. Sup. Ct. 1921).

In reference to the exemption from taxation of property when used exclusively and owned by persons or associations of persons for school purposes,

the statute simply repeats the language of the Constitution which permits the exemption to be made; thus indicating an intention to make the exemption in such cases more restrictive than is the exemption when given to public school houses, public colleges and public academies. The Constitution, as well as the statutes, make the distinction between public property and private property owned and used for school purposes

Texas Technological College was created and is governed by the laws of the State of Texas. It is a public college. Its property is public property of the State of Texas, and is held by Texas Technological College as an agency of the State of Texas. See *State v. University at Houston*, 264 S.W. 2d 153 (Tex. Civ. App. 1954, N.R.E.).

The test for determining whether public property is tax exempt because used for a "public purpose" is whether it is used primarily for the health, comfort and welfare of the public. *A. d. W. Consolidated Independent School District v. City of Brown*, 184 S.W. 2d 914 (Tex. Sup. Ct. 1945). Public education is recognized as a function of State government. *Cassman v. Corsaline Academy, supra*. There can be no doubt that the maintenance of a public school is a public purpose as envisioned by Article 8, Section 2, Texas Constitution. Therefore, this opinion is concerned with the exemption accorded to "public property used for public purposes" by Sections 1 and 4 of Article 7159, Texas Revised Civil Statutes.

From *St. Edward's College v. Waters, supra*, we quote:

"Public schools, colleges, and academies may, under authority of law, be established for the purpose of giving instruction in . . . agriculture, or other pursuit, which can be done practically only by having lands which may be used for the purpose of giving practical instruction, and in such a case all the buildings and

land used for such a purpose would evidently be exempt."

On the authority of this case it is apparent that all the property described as "Property Held Pursuant to the Educational Use Plan," (with the exception of the four buildings which are temporarily excess to the needs of said plan and which are being rented) is exempt from taxation.

The exemption accorded to "public property used for public purposes" is not lost even though such property may be temporarily leased or rented, so long as the public purpose of the property has not been abandoned, and so long as the revenue from such renting or leasing accrues to the public benefit. *State v. City of Beaumont*, 161 S.W. 2d 244 (Tex. Civ. App. 1942, no writ history); *City of Houston v. State*, 113 S.W. 2d 631 (Tex. Civ. App. 1938 Error Dismissed.)

In your letter you state that it is contemplated that the property described as "Property Owned Outright by Texas Tech," and the four buildings listed under "Property Held Pursuant to the Educational Use Plan" which are temporarily excess to the needs of such plan, will eventually be used in connection with the educational use plan and are being held for that purpose. You further state that the income from all rentals is credited to the PayTech Funds Account and is used solely for the promotion of the educational program. It is therefore apparent that the property described as "Property Owned Outright by Texas Tech" and the four rented buildings listed under "Property Held Pursuant to the Educational Use Plan" are also exempt from taxation.

## SUMMARY

The property held by Texas Technological College pursuant to the Educational Use Program is exempt from taxation under the laws of the State of Texas on the grounds that such property is the property of a public college used in connection with the college's educational program. The remainder of the property is also exempt from taxation under the laws of the State of Texas though temporarily leased or rented by reason of its being public property "held" for public purposes, since the public purpose of such property has not been abandoned and all revenues therefrom come to the benefit of Texas Tech and are used solely for the promotion of the educational program at PanTech Farms.

Very truly yours,

WILL WILSON

*Attorney General of Texas*

By Jack N. Price

Jack N. Price

*Assistant Attorney General*

JNP:df

APPROVED:

ORDINANCE COMMITTEE:

Geo. P. Blackburn, *Chairman*

C. Dean Davis

B. H. Timmins, Jr.

L. P. Lollar

Henry G. Braswell

REVIEWED FOR THE ATTORNEY GENERAL

By: W. V. Geppert



THE ATTORNEY GENERAL OF TEXAS  
AUSTIN 11, TEXAS

Will Wilson  
Attorney General

October 7, 1957

Opinion No. WW-270

Re: Whether or not the W. T. Grant Company, Dallas, Texas, is subject to taxation under the lease hold agreement referred to in Article 7173, R.C.S.

Hon. Robert S. Calvert  
Comptroller of Public Accounts  
Capital Station  
Austin 11, Texas

Dear Mr. Calvert:

You request the opinion of this office upon the ad valorem taxability of the lease hold estate of W. T. Grant Company in certain real estate located in Dallas, Texas, in which the University of Texas is the lessor and W. T. Grant Company is the lessee.

You submitted with your request a copy of the lease involved. It is dated December 12, 1946, and expires June 30, 1959. The real property covered by the lease is concededly State owned property and since it is for a term of more than three years its taxability is governed by Article 7173, Vernon's Civil Statutes, which provides in part as follows:

"Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specifically provided by law."

This Statute was construed by the Supreme Court of this State in the case of *Trammell v. Fawcett*, Tax Collector, 74 Tex. 557, 12 S.W. 317, as applicable to the leasehold estate and not to ownership of the fee in the following language which we quote from the opinion:

"If appellant had held the lands under an absolute lease for a term of three years or more, his leasehold estate would have been subject to taxation upon such value as it would bring at a fair voluntary sale for cash, but he would not have been liable to taxes upon the value of the freehold estate in the lands."

Our research does not reveal that this ruling of the Supreme Court has been departed from. Article 7174, V.C.S., provides how such leasehold estate shall be valued. This Statute provides in part as follows:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

You are, therefore, respectfully advised that the leasehold estate of W. T. Grant Company in the real property in question is subject to ad valorem taxes and the value should be ascertained as provided in Article 7174, V.C.S.

#### SUMMARY

A leasehold estate of the lessee in property owned by the State which is for a term of three or more years is subject to ad valorem taxation. The value should be ascertained as provided in Article 7174, V.C.S.

Very truly yours,

WILL WILSON

*Attorney General*

By L. P. LOLLAR

L. P. Lollar

*Assistant*

APPROVED:

OPINION COMMITTEE

Geo. P. Blackburn, *Chairman*

Joe Rollins

J. Milton Richardson

B. H. Timmins, Jr.

Houghton Brownlee, Jr.

REVIEWED FOR THE ATTORNEY GENERAL

By: James N. Ludlum

THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

Will Wilson

Attorney General

October 17, 1957

Opinion No. WW-281

Re: Taxability of City property under  
lease to private industry.

Hon. William J. Gillespie

County Attorney

Lubbock County

Lubbock, Texas

Dear Mr. Gillespie:

In connection with your letter requesting our opinion relative to the captioned matter, you submit the following factual situation:

"The City of Lubbock holds title to a certain tract of real property in Lubbock County which is dedicated to use as the Lubbock Municipal Airport. Such property, being used for public purposes in the past has been exempt from taxation under the express provisions of R.S. Art. 7150.

"On September 15, 1955, the City, through its director of Aviation entered into a lease of a portion of the airport property to the West Texas Compress and Warehouse Company, a Texas Corporation domiciled in Lubbock, hereinafter called lessee.

"The lessee is to use the land for warehouse purposes, and the Airport Board has determined that it is in the public interest that the lessee have such privilege.

"The lease is for a term of five years beginning October 1, 1955, and ending September 30, 1960, with the lessee to pay \$1,100 a year to the City during that period. The lessee is also to erect five metal clad warehouse buildings on the site, which buildings shall become the property of the City by September 30, 1960, the City being conveyed a 1/60 interest in each of said buildings each month during the first five years of the lease. The lessee is further given an option for three consecutive five-year extensions, with a different yearly rental being due during each of those extensions.

"It was further agreed that should the contract lease be abandoned or breached before the initial five-year term was up, the City would have an option to purchase lessee's remaining interest in the buildings. If the City did not desire to exercise its option, then the lessee had the option to purchase the City's accrued interest, and upon payment the lessee could remove the buildings. The further terms of the lease appear in the copy of the lease attached hereto."

Specifically, you submit the following questions:

"(1) Has the land, by virtue of the change in the character of its use, lost its tax exemption?

"(2) Regardless of the tax consequences to the City, does the lessee's leasehold interest constitute a separate taxable interest?"

"(3) Does the lessee's diminishing interest in the buildings constitute a taxable interest to him?"

You state that the property in question "is dedicated to use as the Lubbock Municipal Airport." You also state, "... the property as a whole was acquired for the purpose of serving as an airfield. A great portion of that property has been utilized for that purpose, but the remaining tract (the property in question) has been turned over to private enterprise for a period of possibly 20 years."

The operation of an Airport by a city constitutes a public purpose. If the land in question is being held by the City for a future expansion of the airport, it is tax exempt unless and until the city has abandoned its intention to use the property in the future for a public purpose. *City of Abilene v. State*, 113 S.W. 2d 633 (Tex. Civ. App.); and *City of Dallas v. State*, 28 S.W. 2d 937 (writ refused).

Sec. 2, Art. VIII, of the Texas Constitution provides in part:

"but the legislature may, by general laws, exempt from taxation public property used for public purposes."

Sec. 9, Art. XI, of the Constitution of Texas, provides in part:

"The property of counties, cities and towns, owned and held only for public purposes, such as public buildings and the sites therefor, fire engines and the furniture thereof, and all property used, or intended for extinguishing fires, public grounds and all other property devoted exclusively to the use and benefit of the public shall be exempt from forced sale and from taxation. \* \* \*"

Article 7150, V.C.S. provides that the following property is exempt from taxation:

"Sec. 4. All property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof.

You will note that Sec. 4, of Article 7150, supra, purports to exempt all property, whether real or personal, belonging exclusively to this State, or any political subdivision thereof and does not contain the restriction that such property to be exempt must be *used for public purposes*. Counties and cities are political subdivisions of the State. However, Sec. 2 of Art. VIII, supra, of the Constitution only gives the Legislature the authority to exempt such property when *used for public purposes*. Therefore Sec. 4 is inoperative insofar as it purports to exempt public property regardless of its use in violation of said Sec. 2, Art. VIII of the Constitution, but is valid insofar as it exempts public property *used for public purposes*. *City of Abilene v. State*, 113 S.W. 2d 631.

Sec. 4a of said Article 7150 (not listed above) which requires power districts such as the Lower Colorado River Authority to pay certain amounts in lieu of taxes is unconstitutional. *Lower Colorado River Authority v. Chemical Bank and Trust Co.*, 190 S.W. 2d 48.

The Court held power districts to be political subdivisions of the State and as the property was devoted to a public use it was exempt from taxation under Sec. 9 of Art. XI of the Constitution, supra.

County and city property if actually held for a future public use is exempt although temporarily rented or leased. *State v. City of Houston*, 110 S.W. 2d 277. County and city property if used or held for public purposes is exempt, although not owned or held exclusively for such purpose. *State v. City of Beaumont*, 161 S.W. 2d 344.



The Test for determining whether "public property" is tax exempt is whether it is used primarily for the health, comfort or welfare of the public. To be used for public purposes it is not essential that it be used for governmental purposes. *A. d. M. Consol. Ind. Sch. Dist. v. City of Brown*, 184 S.W. 2d 914. That charges are made for use of public property does not withdraw it from its public character, if such charges are an incident to its use by the public and the proceeds inure to the benefit of the political subdivisions. *Id.*

Land acquired by a city for a public purpose, such as a site for a water reservoir, is tax exempt, although the city temporarily leases same for agricultural or other purposes, if the city has not abandoned its intention to build such reservoir. *City of Dallas v. State*, 28 S.W. 2d 937.

You are therefore advised that if the City is holding the property in question for a future expansion of the airport, or for other public purpose that it is tax exempt to the City.

Article 7173, Vernon's Civil Statutes provides:

"Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this State, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specifically provided by law."

Article 7174, Vernon's Civil Statutes provides:

"Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash."

The Supreme Court of Texas in *Tramwell v. Taught, Tax Collector*, 74 Tex. 557, 12 S.W. 317, held that the tax

able value of real property, taxable by virtue of Article 7173, supra, was the value of the leasehold estate and not the value of the fee. We answer your second question in the affirmative.

In reference to your third question it appears that on January 1, 1958, the City will own an undivided 3/60 of the improvements. This 3/60 interest will constitute a part of the leased premises and the value of same should be considered in arriving at the assessable value of the leasehold estate. On each succeeding January 1st, the City will own 12/60 additional interest in the premises and the assessable value of the leasehold estate will increase in value accordingly.

Article 7174, Vernon's Civil Statutes provides:

"Personal property, for the purposes of taxation, shall be construed to include . . . all improvements made by persons upon lands held by them, the title to which is still vested in the State of Texas, or in any railroad company, or which have been exempted from taxation for the benefit of any railroad company, or any other corporation whose property is not subject to the same mode and rule of taxation as other property."

It follows that on January 1, 1958, 3/60 of the value of the improvements should be assessed against the lessee as personal property owned by him. Each year thereafter he will own 12/60 less interest in the improvements and should be assessed accordingly. We appreciate the able brief which accompanied your request.

#### SUMMARY

Property held by a city for the purpose of future expansion of an airport or other public purpose is tax exempt to the city. A leasehold estate covering tax exempt property of a city if held under a lease for a term of three years

or more is taxable to the lessee and should be valued at such price as it would bring at a voluntary sale for cash. The interest of the lessee in improvements placed on the leased premises should be assessed for taxation as the personal property of the lessee.

Yours very truly,

WILL WILSON

*Attorney General of Texas*

By W. V. GEPPERT

W. V. Geppert

*Assistant*

WVG:vk

APPROVED:

OPINION COMMITTEE

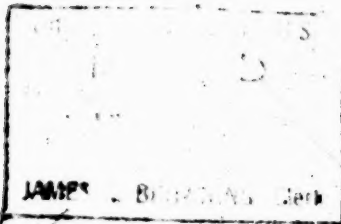
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John B. Webster

B. H. Timmins

REVIEWED FOR THE ATTORNEY GENERAL

By: James N. Ludlum



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In the  
**Supreme Court of the United States**  
OCTOBER TERM, 1959

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No. 40

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PHILLIPS CHEMICAL COMPANY, a Corporation,  
*Appellant,*  
v.

DUMAS INDEPENDENT SCHOOL DISTRICT,  
*Appellee.*

---

*On Appeal from the Supreme Court of the State of Texas*

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**APPELLEE'S PETITION FOR REHEARING**

---

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,  
Box 473,  
Hereford, Texas,  
*Attorneys for Appellee,  
Dumas Independent School  
District.*

March 18, 1960.

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*On Appeal from the Supreme Court of the State of Texas*

---

**APPELLEE'S PETITION FOR REHEARING**

---

Dumas Independent School District, the above named Appellee and Petitioner herein, presents this Petition for a Rehearing and, in support thereof, respectfully shows:

**I**

**The Court's Opinion Misconstrues the Appellee's Argument  
Based on the Similarity of the Texas Statute and the  
Michigan Statute.**

Appellee bases two important arguments on the similarity of the Texas statute and the Michigan statute. First,

the Michigan statute, held constitutional by this Court, effectively provides for the taxation of lessees of Federal property only, and does not provide for the taxation of lessees of other exempt property, when this statute is considered as a part of the Michigan taxing structure. Although this Michigan statute purports to apply to lessees of all exempt property, another section of the Michigan taxing statutes provide that where a tenant of real estate pays taxes thereon, he may deduct the same from his rent. Michigan Statutes Annotated, Section 7.97. While this statute is ineffective as against the sovereignty of the United States, it is effective as to the State of Michigan, which enacted the statutes, and all other owners of exempt property. Thus, all lessees of exempt property are effectively exempted from taxation, except only lessees of Federal property. This was recognized in the Michigan Courts in their decision of the Michigan cases, *Township of Muskegon v. Continental Motors Corporation*, 346 Mich. 218, 77 N. W. 2d 799.

Then, beginning at page 9 of the Slipsheet opinion, the Court said:

“The Michigan statute, although applicable generally to lessees of exempt property, contained an exception for property owned by state-supported educational institutions. Appellee’s argument, essentially, is that the exemption of lessees of school-owned property from the Michigan statute supports the imposition here of a heavier tax on Federal lessees than is imposed on lessees of other exempt public property, in general.”

Appellee respectfully shows the Court that this was not its argument. Rather, its argument was that the exception of school-owned property, together with the exception of a private use of exempt property "by way of a concession in or relative to the use of a public airport, park, market, fairground, or similar property which is available to the use of the general public," and the exception of Federal property for which payments are made in lieu of taxes, when considered together, result in exceptions so broad in scope that, if the Michigan statute were found in Texas at least, there would remain no exempt property used for private purposes that would be subject to taxation under the statute except Federal property, and that, presumably at least, essentially the same situation would be applicable in Michigan.

Item by item, Appellee attempted to point out to the Court that every example attempted to be given of State and local property subject to lease in Texas was property of a kind that would have been exempted from taxation under the Michigan statute. Even the warehouses at Pantex Ordnance Plant, leased to Appellant here, and which were the only examples of State property leased to private persons for profit cited by this Court in its opinion, consisted of nothing more than a small part of a large property owned by a state-supported educational institution. Again, Appellee respectfully urges to the Court that Appellant has not shown the Court one example of property in the State of Texas, owned by the State or its local subdivisions, that is leased to private persons, and that would be

subject to taxation under the terms of the Michigan statute, if that statute were enacted in Texas.

Thus, the real argument made by Appellee here is not that the exemption of property of State-owned educational institutions in Michigan is sufficient, in itself, to support any classification that the Texas Legislature might attempt to erect, but rather that the real and actual effect upon State and local taxation in Michigan under its statute is essentially identical to the real and actual effect of State and local taxation in Texas under its statute.

The evidence before the Trial Court in the Michigan cases was to the effect that the statute was enacted for the purpose of allowing taxation of Federal properties leased to private persons, and there was evidence that there were probably no more than three or four instances anywhere in the State where property other than Federal was made subject to taxation by the statute. It is easy to see why the government contended, in its appeal in the Michigan cases, that the Michigan statute was "special legislation" directed at government property. (Note 11, Slipsheet 10.) If the real purpose and effect of the Michigan statute was to tax Federal property, in a way and manner virtually identical with the result arrived at under the Texas statute, and only the wording and terminology of the statutes is different, and if in both cases the Appellant contended that the statute was invalid because it discriminated against Federal property in an unconstitutional way, then it is difficult to see how the second case can be

decided differently from the first case, without overruling or repudiating the first case.

If the Texas Legislature should, as a result of the decision in this case, enact the Michigan statute verbatim, it is not seen that any difference would result in tax consequences, either to the Appellant in this case, or to any other lessee of tax-exempt property in this State, from that which resulted under the statute now declared invalid by this Court. The warehouses and the igloos at Pantex Ordnance Plant would still not be subject to taxation, because they are property of a state-supported educational institution. There would still be no other properties in this State, of a similar nature of that leased to Appellant here, that would become subject to taxation by virtue of the enactment of the Michigan statute in Texas. This is the crux of Appellee's argument based on the Michigan statute, and Appellee still respectfully contends that it is a substantial and meaningful argument. As this Court said only two years ago, in *City of Detroit v. Murray Corporation of America*, 355 U. S. 489, 493:

"\* \* \* but to strike down a tax on the possessor because of such verbal omission would only prove a victory for empty formalisms. And empty formalisms are too shadowy a basis for invalidating state tax laws. Cf. *Henneford v. Silas Mason Co.*, 300 U. S. 577. In the circumstances of this case the state could obviate such grounds for invalidity by merely adding a few words to its statutes. Yet their operation and practical effect would remain precisely the same."

The effect then, of this Court's decision that the Texas statute is invalid, when there is no evidence before the

Court that any different tax consequences would flow from a statute which this Court has approved, and to which approval it still adheres in its opinion here, would seem to be a victory for empty formalisms, and to be a determination of the invalidity of such statute resting merely on an examination of that statute itself, as if it were operating in a vacuum, a test which the Court has taken care to repudiate. (Slipsheet 7.)

## II

**The Court's Opinion Accords Undue Weight to the Proposition That the State of Texas and its Subdivisions Lease Valuable Property to Commercial and Business Enterprises, as Does the Federal Government, in View of the Extremely Limited Extent to Which This May Be True.**

As will be more fully hereinafter urged, the record of the evidence and of the trial in this case reflects not one single example of industrial or commercial property leased by the State of Texas or its subdivisions to private business. Appellant attempted to remedy this defect of proof by going outside the record, and by citing several statutes and opinions of the Attorney General of Texas, all purporting to show instances where the State and its subdivisions lease their property to private persons. This was done by Appellant in its reply brief, filed only three days before oral argument, so that Appellee's only showing in rebuttal was in its oral argument. Point by point, and property by property, Appellee attempted to show in its oral argument



that all of the examples given were of non-industrial or non-commercial property, or of such a nature that they would have been excepted from taxation by the terms of the exemption provisions of the Michigan statute approved by this Court in 1958.

It was believed that this had been accomplished in such oral argument, until, after the conclusion of Appellee's argument, there came on for discussion by Appellant's Counsel the matter of certain warehouse facilities at Pantex Ordnance Plant, leased by Texas Technological College to Phillips Chemical Company. It then became apparent to counsel that the Court seemed impressed by this example, failing to find any distinction between this leasing and the leasing to the same lessee of Cactus Ordnance Works.

There is, however, a distinct and important difference, which the Court seems to have overlooked. Cactus Ordnance Works is a valuable industrial plant, erected and owned by the government for manufacturing purposes. The erection of a similar plant for itself would have cost Appellant in excess of \$30 million dollars. This entire plant is leased to Appellant for its private commercial purposes, at an annual rental that is only a fraction of the customary rental value of similar commercial properties.

The situation at Pantex Ordnance Plant, as reflected by the Attorney General's opinion appended to Appellant's reply brief, and cited by the Court (Note 8, Slipsheet 8), is quite different. There, Texas Technological College, a State educational institution, owns 6,000 acres of land

Out of an original 16,000 acre grant, 10,000 acres of which was recaptured by the government, part in fee and part for a 20-year term, for educational purposes. Out of all of this property, it appears that some seven warehouse buildings and 102 ammunition-storage "igloos" are temporarily excess to the educational needs of the college and are being leased. Surely this situation is more comparable to the leasing of concession space for a tailor shop in an army post exchange than it is to the leasing of an entire multi-million dollar industrial plant to a private corporation for profit. Yet, this is the example, and the only example, that this Court cites to support its view that there is found, in Texas, the leasing of State and local government property comparable to the leasing of Federal government property.

The Court says (Slipsheet 8) that "it is conceded that the State and its subdivisions lease valuable property to commercial and business enterprises, as does the Federal government." Except to the limited extent reflected by the above example, by certain limited concession-type leases, and certain rare instances that may perhaps be found of property of limited value with incidental commercial possibilities but not designed primarily for such purpose, Appellee must respectfully state that it does not so concede. Appellant has not pointed to one example of an industrial or manufacturing plant that is owned by the State of Texas or any of its subdivisions, and that either is or could be leased to a private entity. Neither the States nor its subdivisions own any such type of property. If a single example of such ownership and leasing could have been found, surely Ap-

pellant would have pointed it out to the Court, in place of pointing out Pantex Ordnance Plant, where on almost 9½ square miles of land, there is to be found leased only a few buildings and some storage igloos, with all the rest of the property being devoted to educational uses of the Department of Agriculture of Texas Technological College.

This Court has traditionally refused to decide issues not before it, and has refused to consider, in determining the validity of a statute, whether or not such statute might be invalid if differently applied from the way that it is applied in the case before the Court. As the statute was applied to Appellant here, it levied a tax upon Appellant's interest in the full and complete use of a commercial industrial plant. No attempt has been made under this statute to levy a tax upon a lessee from the Federal government of any property comparable to property owned and leased by the State or its subdivisions. Appellant attempted, in its oral argument to paint a picture of Cactus Ordnance Works on one side of the road, and Pantex Ordnance Plant on the other side of the road, both leased to Phillips Chemical Company, but with different tax consequences to the lessee by virtue of the different lessors involved. This picture is not accurate; it does not reflect the true situation found. If it did, then discrimination might be conceded; but in the case actually presented before the Court, the nature of the property interests leased on the two sides of the road are so different that no fair comparison may be made between them.

## III

**The Court's Opinion Fails to Give Sufficient Consideration to the Practical Operation and Effect of the Challenged Statute in View of the Nature of the Publicly-Owned Property in Texas.**

When the Republic of Texas gave up its independence and became one of the United States in 1845, it was allowed to retain its public land in consideration of its retention of its public debt. Therefore, there is no general body of Federal public land in Texas. The property that the government owns in Texas is property that has been purchased or acquired for specific purposes. Thus, there are no Federal forest lands, grazing lands, or other similar types of Federal property in Texas. In spite of this fact, a recent bulletin of the General Services Administration released to the press, and generally reported since the opinion in this case was announced, states that Texas stands fourth among the states in the value of Federal property located in the State. This property, of course, consists of office buildings, military installations, industrial plants, and other related types of improved properties.

Yet, not a single example has been given in this case of Federal property that is leased to private persons except the type of property involved in this case, that is, industrial and commercial property being devoted to private profit. Therefore, when the Court states (Slipsheet 8) that "Article 5248 imposes its burdens on *all* (emphasis by the Court) lessees of Federal property," it can be seen that

this result is not so broad or all-inclusive as it might be in other states where the Federal government owns and leases grazing lands, mining lands, timber lands, and many other types of property.

It is true, as the Court says, that Appellee has argued that one basis for justifying the classification erected is the serious impact of this type of Federal leasing on the local governments involved, but the argument attempted to be made by Appellee goes farther than this. Not only is this impact serious because of situations such as is presented in Dumas, Texas, where this tremendous plant has created a serious problem of school financing for the Appellee, but also, it must be kept in mind that no where in Texas is there a similar situation presented where the lessor is the State or a local subdivision of government. Certainly the seven warehouses and the few igloos leased "as needed" by the Appellant at Pantex Ordnance Plant create no special problem for the school district or any other unit of government, where Pantex Ordnance Works is located.

Thus, as this statute is applied in this case, and as Appellee believes it should be applied in all other cases of Federal leasing in Texas, the result is to tax an industrial or commercial operation that is obtaining a wind-fall use of a large and valuable facility for its private profit, while competing with similar businesses that are required to make their own investment in order to have commercial or manufacturing facilities. By contrast, the occasional State or local lessee that is not taxed, or that is taxed at a lowed

rate or valuation, is to be found using a part only of some State or local property, such as an occasional temporarily un-needed warehouse or storage facility, an unused building at an airport, concession-type facilities in a public building, or some other similar property.

In this case, the Court has reached its decision as if there had been presented to it a question of what might happen under this statute, rather than what has happened. Seldom has this Court gone so far in striking down a State statute merely because, if the statute had been differently applied or had been applied to a different situation, it would be invalid. It will be time enough to declare this statute unconstitutional as applied, if Texas or its political subdivisions attempt to levy, under its authority, taxes upon the blind man who sells cigarettes and candy in the post office lobby, the company that operates a dry cleaning pick-up station at the army post exchange, and other similar users of Federal facilities. As it was applied in this case, however, the Texas statute did not attempt to levy such a tax, but levied a tax upon a type of lessee whose counterpart is not to be found leasing or using State or local property.

#### IV

**The Court Has Decided This Case as Though the Discrimination Found Had Been Proved, When the Record Is Actually Devoid of Any Evidence Showing Discrimination in Fact.**

Appellant had urged at all stages of this proceeding that Article 5248 is invalid on its face, because it applies



only to private users of Federal property. This Court has correctly stated that a determination of this invalidity cannot rest merely on an examination of that article alone, since it does not operate in a vacuum, and that "first, it is necessary to determine how other taxpayers similarly situated are treated." (Slipsheet 7.) The Court then says that "such a determination requires 'an examination of the whole tax structure of the state'." (Slipsheet 7.) Thus, the Court recognizes that this is the important and crucial phase of this case, and yet it has made its examination of this key question in the half-light cast by the sometimes vague and erroneous and always unsupported assertions to be found in Appellant's briefs and arguments, and not to any extent in proof made in the traditional manner.

Appellant was plaintiff in the Trial Court, and both for that reason and because there is a presumption of validity inhering in a State statute, it had the burden of showing that the statute in question is unconstitutional. From the beginning, it has attempted to meet this burden by argument rather than proof. This Court characterized the position that Appellant has taken throughout these proceedings as follows: "Phillips argues that because Article 5248 applied only to private users of Federal property, it is invalid for that reason, without more." (Slipsheet 6.) Apparently believing that this argument was sufficient to carry the day, Appellant brought no evidence in the Trial Court to show that any other lessee of comparable property from a different kind of lessor was taxed differently from itself. It brought no evidence to show that there is a single

property of a similar kind, in size, quality, character of use, or otherwise, that is owned by the State of Texas or any of its subdivisions, and that is leased to private users for profit.

Not until Appellant reached this Court did it decide that perhaps it should have some evidence on this question. It then set about attempting to supply this evidence, outside the record, by bringing it forward in briefs. In its main Brief, it gave only one example, that of oil and gas lands owned by the State and its subdivisions. (Appellant's Brief, p. 29.) As was pointed out by Appellee in its Brief, this example was not pertinent, because it is well known that the lessee's interest in these oil and gas lands is fully taxable. In its Reply Brief (pp. 7-8), Appellant attempted to list additional examples of property leased by the State and its subdivisions, but as Appellee attempted to show in its oral argument, not a single example among these is of property comparable in any way to the industrial and commercial property that is before the Court in this case.

Yet, even assuming that the examples given by the Appellant in its briefs would show discrimination in fact, even after actual testimony were brought to show the nature and extent of such leasing without taxation, it still remains true that these matters are not in evidence in this case. Thus, in finding discrimination in fact, as this Court apparently has done, the Court has supplied for Appellant, at this late stage in the proceedings, the missing proof. Appellee respectfully contends that this does not accord with this Court's usual function of deciding

cases upon the record below. Customarily, Appellate Courts, including this Court, when a defect of proof is found and it appears that upon further consideration, a different case might be presented, will do no more than reverse and remand the case for further trial, in order that the proof may be made in the proper manner, at the Trial Court level, and with both sides, not just one, having an equal opportunity to show what the facts actually may be.

This Court has traditionally refused to reach constitutional questions when a case may be decided, upon the record before it, without reaching them. Appellee respectfully urges that this case merits affirmance upon the ground that the record fails to show any discrimination in fact, whether or not such discrimination might be shown by a more complete examination of available evidence. In the alternative, if the Court feels that the constitutional question is so closely approached that an affirmance would not be warranted, then Appellee respectfully suggests that the case be reversed and remanded for further proof. If this case reflected a situation where the State and its subdivisions were leasing comparable property to private users who were escaping taxation, or if this case concerned itself with the taxation of lessees of Federal property of a type that the State and its subdivisions may lease to private users, then in either event, it might be conceded that the case should be reversed, but where neither the record in the case nor fair inferences from the extraneous matters injected into the case at the Appellate level show

either of these situations to exist, then Appellee respectfully contends that the case should not have been reversed and the statute held unconstitutional.

## V

### **The Court's Opinion Contrasts Sharply With Its Almost Unbroken Line of Decisions in This Field for More Than Twenty Years, Culminating in the 1958 Michigan Cases.**

This Court has decided many cases in the field of inter-governmental tax immunity. The first and most important of these, *McCulloch v. The State of Maryland*, 4 Wheat. 316, was founded upon the proposition that where two sovereignties operated in the same area at the same time, then neither should have the power to tax the operations of the other, because the power to tax involves the power to destroy. This Court well knows how, for a period of more than one hundred years thereafter, this doctrine was applied, or mis-applied, in case after case. Without burdening the Court with the cases, already cited in briefs in this appeal and all familiar to the Court, it is remembered that the doctrines were stretched to the point that it was even held that the Federal government could not levy an income tax on the salary of a state or local employee, an oil and gas lessee of Federal lands could not be taxed on his leasehold, there could be no taxation of a Federal copyright or patent, and many other examples in this same vein.

The Court also knows, however, that this trend of decisions was sharply reversed during the 1937 term, and that since that time, the Court has attempted to discover, in each case, whether or not the dual system of government was actually being challenged in the levying of the questioned tax. As a result, many of the older cases were overruled, and now, for example, the Governor of Texas pays Federal income taxes, and the District Director of Internal Revenue in New York pays State income taxes; copyrights, and patents are subject to taxation; contractors with the Federal government pay State use taxes; and many taxes which would have been declared invalid fifty years ago are now common-place.

It is recognized, of course, that the decisions of these last twenty years do not represent a changed interpretation of the Constitution and what is required in this field, but rather that they represent a return to the orthodoxy of correct constitutional interpretation, and a repudiation of the heresies of the late Nineteenth and early Twentieth Centuries. In short, it might fairly be said that the position of this Court of late has usually been that if the tax is not a direct tax against the government on its property, the tax is valid.

Yet, in this case, not only is the tax levied against a private property interest, rather than a government property interest, but, as the Court expressly recognizes in its opinion, Congress has consented to the taxation of this private property interest, thereby waiving any claim of governmental immunity. This point will be touched upon

more fully in the next subdivision of this petition, but for the present, Appellee again respectfully urges that this decision is completely out of harmony with the recent decisions of this Court, more fully cited in earlier briefs, recognizing the broad powers of taxation and classification reserved to the states by our Constitution.

## VI

**The Court's Opinion Treats This as a Case Involving Intergovernmental Tax Immunity, While at the Same Time Recognizing That the Property Interest Taxed Is Specifically Made Taxable by Congress, Thereby Waiving Any Claim to Immunity.**

This Court has correctly held and indicated in its opinion that the property interest here taxed is a private property interest, and not an interest in Federal property: "Phillips' use of the government's property, by way of contrast, is not exempt." (Slipsheet 6.) Yet, the Court insists that decisions in the intergovernmental tax immunity field are controlling: "But we have made it clear, in the equal protection cases, that our decisions in that field are not necessarily controlling where problems of intergovernmental tax immunity are involved." (Slipsheet 9.) While thus recognizing that Congress has created a type of taxable private property interest, and has expressly made the same taxable by the states, yet this Court has withdrawn some of this waiver of immunity and has, in effect, stated that where a private property interest is federally-created, or federally-related, a different rule will be applied to it from the



rule that would be applied if it were otherwise created or related.

In so doing, the Court has departed from established precedents, and has erected a protective shield about lessees from the Federal government not heretofore found. As Mr. Justice Holmes said many years ago, "When an interest in land, whether freehold or for years, is severed from the public domain and put into private hands, the natural implication is that it goes there with the ordinary incidents of private property, and therefore is subject to being taxed." *Trimble v. City of Seattle*, 231 U. S. 683. Further, this Court has held that when Congress has created a type of taxable private interest, or has consented to the taxation of a Federal interest, that no uniformity of such taxation is required by Federal law, and such taxable interest is subject to the ordinary principles of State taxation. *Reconstruction Finance Corporation v. Beaver County, Pa.*, 328 U. S. 204.

What prohibited interference with the United States and its activities is to be found in the statute now before this Court? What is the "government's interest" that must be weighed in the balance?

Will the addition of a state ad valorem tax to the cost of doing business in the leased premises cause potential lessees of property of this type to reject the proffered leases? Surely a negative answer to this question is manifest. How important are a few thousand dollars more in taxes on a lease with an annual rental in excess of \$1 million dollars?

Further, where else could this lessee obtain a manufacturing plant suitable to its needs without building or buying it? Certainly it could not lease it from the State of Texas or its subdivisions, since they own no such plants. Surely this Court recognizes that the government is not in competition with anyone in leasing its surplus plants. Private industry just does not own this tremendous store of surplus manufacturing facilities, nor do the states and local governments own them. And still further, what other property does the Federal government lease in Texas than industrial plants of this kind? Nothing else has been shown to be so leased.

Further, if the impact to be considered is economic, this Court has frequently held that this is of no importance. *James v. Dravo Contracting Company*, 302 U. S. 134; *Alabama v. King & Boozer*, 314 U. S. 1.

Still further, in this case, and it is this case with which we are concerned, there is evidence which would show that the action of this Court in reversing the judgment below will actually cost the United States money, rather than save it money. The evidence shows that the United States now pays a considerable sum of money each year to Appellee School District as a Federal grant, because of the economic impact of this plant upon the school district. This grant would be reduced by the amount of taxes paid, or would be eliminated if the taxes were higher than the grant, thereby resulting in a saving to the United States. On the other hand, the terms of the lease itself, as shown in the record (p. 76), provides that there would be no

decrease in the rent to the United States by virtue of taxation of the lessee's interest in this property. In other words, Appellant's taxes on its property interest are now paid by the United States, while under the holding of the Texas Courts, it would have to pay its own.

This Court does not intimate, in its opinion, that the classification erected by the State of Texas in this instance is so palpably arbitrary or unreasonable to be invalid, absent some relation to the intergovernmental tax immunity field. In fact, by finding it necessary to weigh the government's interest in the balance, the Court has intimated the contrary. Appellee again respectfully contends that the classification is not arbitrary, with or without a consideration of any possible interest of the United States.

## VII

**The Court Erroneously Construed One Point of Texas Law,  
On a Point Not Necessary to the Decision of the Case in  
Any Event, and This Construction Should Be Deleted  
From the Opinion of the Court.**

At Slipsheet 4, the Court stated that, because the lease in this case is subject to termination, it is not a lease for three years or more and is therefore not subject to taxation under Article 7173, Revised Civil Statutes of Texas.

In the first place, no question of the taxability of the leasehold of Phillips under Article 7173 was presented to the Court, no decision on the matter was requested of the Court, the matter was not raised in the jurisdictional state-

ment, and therefore this dictum by the Court is unwarranted.

Further, the opinion of the Court below, on this question of purely local law, effectively overruled the earlier Texas case cited by the Court, *Trammell v. Faught*, 74 Tex. 557, 12 S. W. 317.

Therefore, the statements of this Court in its opinion with respect to the above matters should be deleted therefrom, and rehearing of this cause should be granted for the purpose of so doing, and for the purpose of allowing Appellee to show unto the Court the propriety of this request.

### CONCLUSION

Your Petitioner respectfully submits that upon both reason and authority, and as applied in this case; Article 5218 of the Revised Civil Statutes of Texas does not discriminate unconstitutionally against lessees from the Federal government, in that the statute is applied in this case only to a private corporation leasing from the Federal government substantial property of a commercial and industrial nature, and that there is no counterpart to be found in Texas to this type of lessee, in that neither the State nor its local subdivisions own any property of a similar nature; and that, particularly in this case, where there is no evidence to support a finding of discrimination, the Court should not rely upon inferences and purported showings outside the record of the existence of similar leases which do not in fact exist, to overturn this statute. Further, where a statute could be written that would, on its

face, eliminate the apparent defects found by this Court to exist in the Texas statute, under which substitute statute there would be no substantial difference, if any, in tax consequences from that found under the present statute. then the statute in question should not be declared invalid.

Therefore, your Petitioner respectfully represents that a rehearing should be granted and that the decision of the Courts below should be affirmed; and in the alternative, if this Court is of the opinion that a further trial upon the merits would show in fact the discrimination which this Court believes to exist, then that this Court should at least offer the opportunity for such re-trial by granting a rehearing herein, and by reforming its opinion to direct that the fact issue of discrimination be re-tried in the Courts below.

Respectfully submitted,

JAMES W. WITHERSPOON,  
JOHN D. AIKIN,  
WAYNE E. THOMAS,  
EARNEST L. LANGLEY,

Box 473,

Hereford, Texas,

*Attorneys for Appellee.*

March 18, 1960.

**CERTIFICATE OF COUNSEL**

I, Earnest L. Langley, Counsel for the above named Petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

*Counsel for Appellee* 